

1965

The Third Annual Kentucky Court of Appeals Review

Kentucky Law Journal

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Recommended Citation

Kentucky Law Journal (1965) "The Third Annual Kentucky Court of Appeals Review," *Kentucky Law Journal*: Vol. 54 : Iss. 2 , Article 9.
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The Third Annual Kentucky Court of Appeals Review

FOREWARD

The Court of Appeals Review is a combined project of the entire staff of the Kentucky Law Journal. This third edition is the culmination of considerable work and effort on the part of the entire staff in attempting to adequately serve the Kentucky Bar and to assist legal scholars throughout the Commonwealth and the nation. This review covers the 1964-1965 term of the Kentucky Court of Appeals with the cases categorized and analyzed in relation to the previous law in each specific area. Our purpose has been to integrate the combined talent of the staff into a single product which would serve as a ready reference material.

The Editorial Board

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I. ADMINISTRATIVE LAW

A. ADMINISTRATIVE AGENCIES

The scope of operations of state administrative agencies was examined in six cases arising during the last term of the court.

1. Railroad Commission

In the case of *Kentucky Railroad Comm'n v. Railway Express Agency*¹ the Court of Appeals, in affirming the circuit court, held that the order of the Railroad Commission refusing permission to the express agency to consolidate its Morganfield office with its Evansville-Henderson office was not supported by substantial evidence. The court reaffirmed its prior holding² that the scope of review by the circuit court extends only to determining whether there is any substantial evidence to support the finding of the Railroad Commission. The evidence briefly summarized was that Morganfield had a population of approximately 5,000 persons, that the express agency would save about 3,500 dollars per year by establishing a pick-up and delivery route instead of maintaining a full-time agent at Morganfield, and that a small number of customers would suffer the inconvenience of not being able to deliver outgoing express to that office at any time of the day. In so deciding, the court reaffirmed its prior position³ that even though the express agency is regulated by the state for the public welfare, it is still a private company with a right to cut costs and meet competition unless it is clearly established that the public will suffer substantial loss or inconvenience.

2. Public Service Commission

In *Blue Grass State Tel. Co. v. Public Serv. Comm'n.*⁴ the court held that the Public Service Commission acted unreasonably in denying the telephone company's application for a certificate of convenience and necessity to operate a telephone system solely because of a disparity between the depreciated original cost of the system and the price actually paid for the system. The court reasoned that since the commission's duty when an existing utility is purchased is to determine if the utility will continue to be operated in the public interest, that the application should not be denied merely because of prospective rate increases due to a large purchase price.

¹ 387 S.W.2d 298 (Ky. 1965).

² *Railroad Comm'n of Kentucky v. Illinois Cent. R.R. Co.*, 265 S.W.2d 797 (Ky. 1954).

³ *Railroad Comm'n of Kentucky v. Illinois Cent. R.R. Co.*, 358 S.W.2d 533 (Ky. 1962).

⁴ 382 S.W.2d 81 (Ky. 1964).

The commission can in the future adjust the rate base if an excessive purchase price was paid, by excluding the amount of the excess.

The court, in *Kentucky Util. Co. v. Public Serv. Comm'n*,⁵ held that the Public Service Commission acted reasonably in granting a certificate of convenience and necessity to a rural electrical cooperative which proposed to construct a generating plant to supply immediately foreseeable electrical needs where the facilities of the existing utilities are presently inadequate for this purpose even though the existing utilities desire to expand in the future to fulfill these needs. This decision was based on findings that there would be no wasteful duplication and that the rural cooperative's proposal was feasible. The court was careful to point out that the existing utilities have no absolute right to supply the inadequacy or to be free of competition. The tests used to determine the "inadequacy" and the "immediately foreseeable needs" had been laid down in a prior decision.⁶

3. Alcoholic Beverage Control Board

In *Moberly v. Bruner*⁷ the court reaffirmed its prior interpretation⁸ of Ky. Rev. Stat. 243.450 (2) [hereinafter cited as KRS] by holding that even though an applicant for a retail beer license has fulfilled the technical requirements for obtaining a license, the Board may still refuse to issue said license if substantial reasons exist why its issuance would not be in the public interest. Those reasons found to be substantial in this case were that the proposed site is at a heavily traveled intersection and that the outlet would increase congestion, that school children load and unload buses at that intersection and they would be exposed to a detrimental influence, that the outlet is in the midst of a residential section and within 250 feet of a church whose pastor and a number of the church members oppose it, and that beer is now obtainable at two shopping centers in the vicinity.

4. Department of Motor Transportation

The only case involving this department this term was *Jones v. Meigs*.⁹ This case was an original proceeding in the Court of Appeals to prevent the Franklin Circuit Court Judge from assessing an unsuccessful applicant for a common carrier truck certificate the costs of his successful competitor's transcript expenses for an appeal to the Franklin Circuit Court. The Court of Appeals rightly held that the pro-

⁵ 390 S.W.2d 168 (Ky. 1965).

⁶ *Kentucky Util. Co. v. Public Serv. Comm'n*, 252 S.W.2d 885 (Ky. 1952).

⁷ 382 S.W.2d 406 (Ky. 1964).

⁸ *Alcoholic Beverage Control Bd. v. Woosley*, 367 S.W.2d 127 (Ky. 1963).

⁹ 383 S.W.2d 324 (Ky. 1964).

visions of KRS 281.780(3), Kentucky Rule of Civil Procedure 54.04 [hereinafter cited as CR], and KRS 453.040(1)(a) providing for the taxation of costs to the losing litigant take precedence over regulation 11-04(J) of the Department of Motor Transportation.

5. Division of Boating

The court in *Lovern v. Brown*¹⁰ held a regulation of the Division of Boating prohibiting the operation of vessels within one-hundred feet of the Kentucky Dam generator water exhaust chutes was reasonable and within the limits contemplated by KRS 235.280 and KRS 235.320 and a valid exercise of the police power of the state. The plaintiffs, commercial fishermen, had obtained an injunction prohibiting the enforcement of the regulation in the Circuit Court of Marshall County. The evidence showed that the water below the dam would suddenly boil up and suddenly sink into a pocket depending on how much electricity was being used.

B. SCHOOLS AND SCHOOL DISTRICTS

The Court of Appeals had occasion to decide three cases in this area during the last term.

The first case, *Board of Educ. of Harrodsburg v. Bentley*,¹¹ was an action brought to test the validity of a school board regulation requiring that any student who marries must withdraw from school, subject to being readmitted with the principal's consent after one year. The court held the regulation to be arbitrary and unreasonable and therefore void. In reaching its decision the court paid its respects to the general principle that the courts will not interfere with the board's exercise of its discretion unless the board has acted arbitrarily or maliciously.¹² It then pointed out KRS 158.100 which requires each board of education to provide public education facilities for residents of its district who are under 21 years of age. The court further showed that the rule was bad because of its "sweeping, advance determination that every married student, regardless of the circumstances, must lose at least a year's schooling." As its rule in this case the court adopted that of 47 Am. Jur. *Schools* section 155:

However, a pupil may not be excluded from school because married, where no immorality or misconduct of the pupil is shown, nor that the welfare and discipline of the pupils of the school is injuriously affected by the presence of the married pupil.

¹⁰ 390 S.W.2d 448 (Ky. 1965).

¹¹ 383 S.W.2d 677 (Ky. 1964).

¹² *Casey County Bd. of Educ. v. Luster*, 282 S.W.2d 333 (Ky. 1955).

The court distinguished those cases upholding the right of the school board to exclude married students from certain extracurricular activities.

In the second case in this area, *Trimble v. Board of Educ. of Paintsville Independent School Dist.*,¹³ the court reaffirmed prior law¹⁴ in holding that a sheriff cannot recover from a school board an amount in excess of the reasonable cost of collecting its school taxes and found that the amounts set by the circuit court were supported by adequate evidence.

The third case in this area, *Griffey v. Board of Educ. of Washington County*,¹⁵ was a reaffirmation of prior law.¹⁶ The court held that the Attorney General and a claimant to a position on a school board are the only parties who may bring an action to oust a member of a school board for violation of KRS 160.180. The decision is undoubtedly correct under our present state statutes. KRS 160.180 declares that the office is vacant without further action, but KRS chapter 415 spells out directly who must bring the action. Perhaps repeal of chapter 415 would solve the problems inherent in a situation where one elected official is the only person who can take action against another elected official for misfeasance or other actions on his part which should cause his office to be vacated. In other words, where one politician is investigating another politician there is not always the most accurate investigation.

C. MUNICIPAL CORPORATIONS

1. License Taxes

The only case decided in this area last term was *Commissioners of the Sinking Fund of the City of Louisville v. Our Own Deliveries, Inc.*¹⁷ This case involved the question of whether a local cartage business which would deliver cartons for anybody that asked within the area in which it was authorized to operate was a "common carrier" and hence not liable for the license fee imposed on the owners of private carriers by the city. The court followed an 1834 case¹⁸ in holding that the carrier was a "common carrier" and in defining a "common carrier" as "Everyone who pursues the business of transporting goods for hire, for the public generally. . . ."

¹³ 385 S.W.2d 216 (Ky. 1964).

¹⁴ Board of Educ. of Carter County v. Greenhill, 291 S.W.2d 36 (Ky. 1956).

¹⁵ 385 S.W.2d 319 (Ky. 1964).

¹⁶ Kirwan v. Speckman, 232 S.W.2d 841 (Ky. 1950).

¹⁷ 382 S.W.2d 878 (Ky. 1964).

¹⁸ Robertson & Co. v. Kennedy, 32 Ky. 430, 26 Am. Dec. 466 (1834).

2. Bond Issues

*Massey v. City of Franklin*¹⁹ was a taxpayers' action challenging the issuance of revenue bonds by the city of Franklin. The court held that the words "either by purchase or construction" in KRS 103.210, which permits a city to issue revenue bonds, were not mutually exclusive alternatives, but that an acquisition of any industrial building may encompass some existing facilities and some newly built facilities. The court in this case also reaffirmed a prior case²⁰ by holding that the acquisition of such industrial facilities need not be by competitive bidding.

3. Zoning

The first case decided in this area was *Louisville & Jefferson County Planning and Zoning Comm'n v. Coin*.²¹ This case was pending on appeal when *American Beauty Homes Corp. v. Louisville Jefferson County Planning & Zoning Comm'n*²² was decided. Both cases stand for the principle that KRS 100.057(2), insofar as it provides that zoning hearings in circuit court shall be de novo, violates section 27 of the Kentucky Constitution and that the hearing in the circuit court should be confined to questions of law.

The other case decided in this area was *Pierson-Trapp Co. v. Knippenberg*.²³ This case involved an interpretation of KRS 100.420, which requires a majority vote of the entire membership of the commission to approve a zone change. The commission had ten members, nine of whom were present at the meeting. Five members voted for the change, two voted against the change, and two abstained. The Court of Appeals held that when a quorum of a governing body is present those members who are present and do not vote will be considered as voting with the majority of those who do vote.

D. COUNTIES AND COUNTY OFFICIALS

One of the cases decided in this area was *Cook v. Chilton*.²⁴ The Court of Appeals here held that the Legislature's amendment of KRS 78.610 increasing from two and one-half per cent to four per cent the contribution rate of county officers to the county employees' retirement system did not amount to a change in the county judge's compensation during his term of office as prohibited by sections 161

¹⁹ 384 S.W.2d 505 (Ky. 1964).

²⁰ *Gregory v. City of Lewisport*, 369 S.W.2d 133 (Ky. 1963).

²¹ 382 S.W.2d 861 (Ky. 1964).

²² 379 S.W.2d 450 (Ky. 1964).

²³ 387 S.W.2d 587 (Ky. 1965).

²⁴ 390 S.W.2d 656 (Ky. 1965).

and 235 of the Kentucky Constitution. The court reasoned that both the retirement system and the constitutional provisions were intended to promote independence and security for the county official and that, therefore, it would be a distortion of the meaning of the constitution to hold that those provisions were intended to forbid a legislative act designed to achieve the same results as the provisions.

The other case decided this term in this area was *Fannin v. Davis*,²⁵ in which the court laid down a number of general principles as regards invalid expenditures of a county's money by the fiscal court and other county officers. Some of those principles are as follows:

(1) Where a fiscal court raised the salaries of county officers after the first Monday in May in the year of their election in violation of KRS 25.250, KRS 69.250 and KRS 67.120(1) and before July 1, 1950, as authorized by section 246 of the Kentucky Constitution as amended in 1949, then those officers are liable to the county for the amount of their salary raises until July 1, 1950;

(2) A magistrate may recover for the benefit of the county any money paid by the fiscal court to any of its members for work done or supplies furnished to the county in connection with the roads or bridges in violation of KRS 61.210(1);

(3) Where the county clerk's quarterly report and the county treasurer's monthly report apprised the fiscal court of the condition of the county finances the members of the fiscal court will be deemed to have acted wilfully in ordering the clerk to write warrants for claims in excess of budgeted funds, and that such expenditures are illegal;

(4) Where a county treasurer wilfully or negligently signs or countersigns any illegal warrant as in (3) above, then KRS 68.300 makes him liable on his bond for such illegal payments;

(5) If the county funds are illegally disbursed by the fiscal court as in (3) above and cannot be recovered from those persons to whom the payments were made, then the members of the fiscal court are themselves jointly and severally liable for the funds;

(6) All disbursements of county funds by the fiscal court to be legal must be made by majority vote of a quorum present and acting as a court, at a meeting held for that purpose;

(7) Liability would attach for illegally disbursed funds under (6) above in the same manner as for illegally disbursed funds under (3) above.

(8) The surplus funds remaining after the object of a special tax levy has been accomplished are treated as a part of the general fund

²⁵ 385 S.W.2d 321 (Ky. 1964).

of the county and become available for general county use, notwithstanding section 180 of the Kentucky Constitution;

(9) KRS 64.410(1), which requires a sheriff to sign all fee bills presented to the fiscal court is merely directory and not mandatory;

(10) Repayment by the court of funds borrowed in contravention of section 157 of the Kentucky Constitution is payment of an involuntary obligation arising under the principles of unjust enrichment and is not recoverable under KRS 68.100(4);

(11) KRS 179.180 allows a fiscal court to lease machinery without competitive bidding.

II. COMMERCIAL LAW

This past year witnessed two particularly significant developments in the Court of Appeal's treatment of the problems in commercial law. First, the court indicated a willingness to rely on the official comments to the Uniform Commercial Code in deciding issues in this area which are not specifically covered by the black-letter law. This approach resulted in two substantial changes in Kentucky commercial law: a repudiation of the old rule that, upon delivery of the goods to the buyer, the seller in a cash and delivery transaction loses all rights to them; and an invalidation of former decisions which gave priority to a properly filed chattel mortgage over a subsequent motor vehicle repairman's lien arising under KRS 376.270. The other important statement of court policy was its very liberal interpretation of the scope of Kentucky's Mechanics' and Materialmen's Lien Statute.

*Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*²⁶ was an action by out-of-state sellers of automobiles for amounts of checks which had been rendered worthless when the auction company stopped payment on its checks to the buyer. The buyer had received advances from the auction company to finance his acquisition of the cars from the Indiana sellers. After the auction company sold the cars, it stopped payment on its checks, thereby wiping out the buyer's account and causing his checks to be dishonored. The court noted that the auction company had sufficient "notice" of the manner of operation of the buyer to know that stopping payment of its checks to the buyer would in all likelihood result in dishonor of the buyer's checks during the previous week to the sellers. The court held that the sellers of the automobiles had, as between the buyer and themselves when his checks were dishonored, rights with respect to the cars which were then good from an equitable standpoint against the auction company's seizure of the proceeds from the sale of the cars. The court interpreted KRS 355.2-507(2)²⁷ as providing such a seller a right of reclamation of the goods upon demand within ten days after he has delivered them to a buyer where the checks given by the buyer as payment are dishonored.

The *Ogle Buick* case is of particular significance because of the absence of authority on this subject from the other states. Apparently no other court of appellate jurisdiction in this country has yet to apply Uniform Commercial Code section 2-507 to the situation of a seller

²⁶ 387 S.W.2d 17 (Ky. 1965).

²⁷ Kentucky adopted the Uniform Commercial Code in KRS ch. 355 in 1958, effective July 1, 1960.

who, after delivery of the goods in a cash transaction, finds himself unpaid when he discovers that the checks which the buyer gave in payment are worthless.

The court stated that the law regarding this situation before the adoption of the Uniform Commercial Code would have required a judgment against the sellers. The court reasoned that at common law and under the Uniform Sales Act, the implied lien of an unpaid seller of personal property existed only so long as he kept possession of the goods and did not deliver them to the buyer.²⁸ But the court held that the Uniform Commercial Code gave the sellers a right of reclamation against the buyer. The opinion first pointed out that when payment for goods is due and demanded on delivery, the buyer's right to retain or dispose of the property is conditional upon his making the payment due,²⁹ and also that payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.³⁰ After noting that the Uniform Commercial Code does not specifically give to the seller a right of reclamation in such a situation, the court then relied on comment 3 of section 2-507 that the provision of section 2-702 — which provides that a seller who learns that a buyer has received goods on credit while insolvent (even though innocently) may reclaim them on demand within ten days after the receipt, subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor — also applies to the unpaid seller under section 2-507(2) of the Code.³¹

The court recognized that technically the seller's right of reclamation ended when the cars were sold at the auction to good faith purchasers.³² However, it reasoned that the auction company had sufficient "notice" of the manner of operation of the buyer to know that stopping payment of its checks would probably result in dishonor of the buyer's checks to the sellers and thus placed the rights of the sellers to the proceeds of the auction superior to those of the auction company. Therefore, the auction company was held to have had

²⁸ 46 Am. Jur. Sales § 520 (1943); Uniform Sales Act § 56 (formerly KRS 361.560). See *Hoven v. Leedham*, 153 Minn. 95, 189 N.W. 601 (1922), Annot., 31 A.L.R. 574. However, should it not follow that, even without the Uniform Commercial Code, the sellers are entitled to the proceeds because a seller with the right to reclaim property may follow the proceeds of the goods as long as they can be identified. See also, *Parker v. First Citizens Bank & Trust Co.*, 50 S.E.2d 304 (N.C. 1948); 78 C.J.S. Sales § 414 (1945).

²⁹ KRS 355.2-507(2).

³⁰ KRS 355.2-511(3).

³¹ The Uniform Sales Act did not provide for recovery of the goods upon the buyer's insolvency; in such a situation the seller was considered a mere unsecured creditor of the buyer. Note, 29 Ky. L. J. 275 (1941).

³² KRS 355.2-702.

"notice" of the superior rights of the sellers to the cars when it pushed the auction through and then claimed the proceeds in an effort to minimize its own loss due to the buyer's insolvency.

In *Corbin Deposit Bank v. King*,³³ a car owner executed and delivered a valid security agreement to the Corbin Deposit Bank which the bank then perfected.³⁴ While this agreement was still in force, the owner engaged King to make repairs and furnish materials for repairing the vehicle. The question presented was in regard to the priorities as between a properly recorded security agreement and a subsequent motor vehicle repairman's lien arising under KRS 376.270. The court held that the motor vehicle repairmen's lien arising under KRS 376.270 should be given priority over the earlier perfected security interest.

The *Corbin Bank* case changed Kentucky law because, prior to the effective date of the Uniform Commercial Code, the court had favored a properly filed chattel mortgage.³⁵ The theory behind this principle is twofold: that a recorded mortgage serves as notice to the repairman before he does his work, and that, in the absence of a statute, perfected liens first in time are entitled to prior satisfaction.³⁶

The court quoted KRS 355.9-310, relating to the priority of certain liens arising by operation of law, and stated:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by the statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Although not specifically citing it, the court obviously based the decision in this case on a section of the official comment to the Uniform Commercial Code, section 9-310, which reads: "If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest." The opinion further pointed out that, as there is no provision in KRS 376.270 which subordinates its statutory lien to an earlier perfected security interest, the terms of KRS 355.9-310 make the statutory lien superior to the lien of the

³³ 384 S.W.2d 302 (Ky. 1964).

³⁴ KRS 355.9-302.

³⁵ *Lincoln Bank & Trust Co. v. Netter*, 253 S.W.2d 260 (Ky. 1952); see also, 15 Am. Jur. 2d *Chattel Mortgages* § 169 (1964).

³⁶ Annot., 36 A.L.R.2d 229 (1954); Restatement, Security § 76 (1941).

earlier perfected security interest, notwithstanding previous court decisions to the contrary.

The purpose of KRS 355.9-310 is to insure that the liens of those whose work has improved or preserved the value of the collateral should be satisfied before the lien of the holder of the security interest; this theory of priority probably rests on the notion that the latter has protection for his interest in the more valuable collateral. The section does not repeal statutory provisions creating liens which expressly make these liens subordinate to a prior security interest.³⁷ Therefore the effect of this section is limited to those situations where the statute creating the lien is silent as to the question of priorities. KRS 376.270, creating a lien on a motor vehicle for repair work, fits into this latter category.

Thus, in the *Corbin Bank* case, the court departed from its past decisions to bring its interpretations of Kentucky law into conformity with the requirement of KRS 355.9-310 that a motor vehicle repairman's lien arising under KRS 376.270 be given priority over an earlier perfected security interest.

*Wuest Bros. Inc. v. Liberty Nat'l Bank & Trust Co.*³⁸ presented the question of a bank's liability to a depositor for its payment of forged checks drawn on the latter's account. The jury was instructed to find for the bank if it determined that the depositor was negligent in his examination of his bank statements. The court upheld the jury's verdict for the bank applying the principle that the depositor loses his claim against the bank if he fails to report any forgeries within a reasonable time.³⁹

The court noted that the Uniform Commercial Code (although not effective at the time this case arose) clearly sets forth the duty of the depositor to examine the statement of his account and his cancelled checks to discover forgery.⁴⁰ By these sections, the depositor must notify the bank within fourteen days after the statement becomes available to him in order to hold the bank liable for wrongful payment. Thus, by acting quickly, the depositor gives the bank opportunity to defend itself from further forgeries by the same wrongdoer.

In *Campbell & Summerhays, Inc. v. Greene*,⁴¹ the owner had leased land for a period of ten years, giving the lessee options to re-

³⁷ See generally, KRS ch. 376, as most statutory liens are specifically made subordinate to prior perfected security interests.

³⁸ 388 S.W.2d 364 (Ky. 1965).

³⁹ C.I.S. *Banks and Banking* § 356(d)(1) (1938).

⁴⁰ KRS 355.4-406(1), (2)(a)-(c), (3).

⁴¹ 381 S.W.2d 531 (Ky. 1964).

new for an additional ten years and at the end of the twenty-year period to purchase the land at a stated price. The court faced the problem of whether a provision in the recorded lease that a building was to be erected by the lessee free and clear of all mechanics' and materialmen's liens prevented enforcement of such liens against the owner. The court held that the provision does not relieve the owner of the liability which KRS 376.010 imposes upon him.⁴²

The court adopted the rule applied in most jurisdictions that where the lease requires the lessee to make improvements, the lessee has been given "consent" or made an agent of the landlord for such purposes within the meaning of the mechanics' and materialmen's lien statutes.⁴³ There is authority for the opposite conclusion, particularly where the building is primarily for the benefit of the tenant.⁴⁴ This latter proposition was not discussed by the court even though it is obvious that the lessee would have been the primary beneficiary of the building because of the option to purchase the land.

The *Campbell* case is significant because it provides a good indication of the court's present attitude toward the scope of KRS 376.010. In support of its holding in this case, the court reasoned by analogy to the situation of an owner who attempts by contract with a contractor to free himself from lien liability to a subcontractor. The law seems clear that a subcontractor-materialman is not bound by a waiver of lien provision in a contract between the owner and contractor unless he agrees to, or has actual notice of, the provision.⁴⁵

The court firmly supported its decision in this case by holding that its liberal interpretation of KRS 376.010 also governs the analogous situation where a contract of sale requires the vendee to construct an improvement. Two Kentucky cases had previously involved the question of the lien liability of the vendor under these circumstances: *Penney v. Kentucky Util.*⁴⁶ and *Weir v. Jarecki Mfg. Co.*⁴⁷ The court in the *Penney* case reasoned that, although authority to the contrary exists, the general rule is that where a contract of purchase specifically requires the purchaser to make improvements the interest of the vendor becomes subject to a materialmen's lien.⁴⁸ The *Weir* case

⁴² KRS 376.010 provides that any person who performs labor or furnishes materials for the building of a structure by contract or written consent of the owner of the property or his authorized agent shall have a lien on the land.

⁴³ 57 C.J.S. *Mechanics' Liens* § 65(c)(4)(a) (1948); 36 Am. Jur. *Mechanics Liens* § 95 (1936); Annot., 163 A.L.R. 922 (1946).

⁴⁴ *Brown v. Ward*, 211 N.C. 344, 20 S.E.2d 324 (1942); Annot., 79 A.L.R. 972 (1932).

⁴⁵ Annot., 76 A.L.R.2d 1099 (1961).

⁴⁶ 238 Ky. 167, 37 S.W.2d 5 (1931).

⁴⁷ 254 Ky. 738, 72 S.W.2d 450 (1933).

⁴⁸ 40 C.J. *Mechanics' Liens* § 113 (1926).

resulted in an opposite decision, and in the case at bar, the court overruled the *Weir* decision as "unsound."

Thus, Kentucky's Mechanics' and Materialmen's Lien Statute apparently guarantees materialmen and mechanics the fruits of their labor wherever a contract between an owner and a lessee, vendee, or contractor requires construction on the property, even though the owner has put a disclaimer of lien liability in the contract and filed the contract for record.

In *Laundry Operating Co. v. Spalding Laundry & Dry Cleaning Co.*,⁴⁹ the court held that the giving of free service to a competitor's customer with the admitted objective of getting that customer's patronage was a violation of the Unfair Practices Act.⁵⁰ Intent to build one's business from the ranks of a competitor was considered proof of intent to injure competitors.

A significant feature of the opinion is the court's conclusion that the expressions in the act, "injuring competitors and destroying competition," were intended to describe one thing rather than two. The court rejected a recent Minnesota decision which held that the intent to "destroy competition" is a separate element, different from the intent to injure competitors.⁵¹ Instead, the court pointed out that California, the first state to enact such a law, later amended the "and" to "or," "thus eliminating this particular exercise in semantic gymnastics."⁵² In interpreting this provision of the Kentucky Unfair Practices Act for the first time, the court concluded that adoption of the California rule was necessary to achieve the purpose of the law.

*Kaufman's of Kentucky v. Wall*⁵³ involved a question of first impression for the court. The court applied the rule followed in other jurisdictions: while a discharge in bankruptcy may shield a party from liability as to a personal debt, it does not prevent a creditor from using the debt as a set-off against any tort recovery sought by the bankrupt debtor against the creditor.⁵⁴ The court stated that the Bankruptcy Act, while attempting to free an insolvent person of liability for debt, did not intend to give a person an asset which he would not have had without the act.

⁴⁹ 383 S.W.2d 364 (Ky. 1964).

⁵⁰ KRS 365.030(1).

⁵¹ *State v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (1957).

⁵² 383 S.W.2d at 366.

⁵³ 383 S.W.2d 907 (Ky. 1964).

⁵⁴ *In re Morgan's Estate*, 226 Iowa 68, 283 N.W. 267 (1939); *Leach v. Armstrong*, 236 Mo. App. 382, 156 S.W.2d 959 (1941).

III. CONDEMNATION

A. DAMAGES

1. Noncompensable Factors

(a) *Loss of Access and Personal Inconvenience*

In *Commonwealth, Dep't of Highways v. Denny*,⁵⁵ appellees conceded the principle that as long as a property owner has reasonable access to the property after the closing of an existing road by construction of a limited access highway, he has suffered no compensable damages. The case most frequently cited for this proposition is *Commonwealth, Dep't. of Highways v. Carlisle*.⁵⁶ However, it was contended that a different principle must apply when a portion of an existing highway is converted from an ordinary highway to a limited access facility as here. The court found no basis for the application of another rule and reaffirmed the existing rule that limitation of access, so long as reasonable access to the highway system remains, does not constitute a taking by eminent domain. The use to which the property is being put at the time of the taking, as distinguished from contemplated use, is a material factor in determining whether the exercise of police power is reasonable.

The *Carlisle* rule was used to reverse five other cases⁵⁷ dealing with loss of access or personal inconvenience. The landowner alleged in *Commonwealth, Dep't of Highways v. Prewitt*,⁵⁸ that removal of the main tract from direct access to United States Highway 60 resulted in the diminution of the value of that tract because the tract was then removed from the U.S. 60 "community" or "influence." The court, however, held that any reduction in the value of the main tract attributable to its loss of the U.S. 60 "community" or "influence" is a noncompensable item for the same reason that impairment of access to a public highway is noncompensable. The same principle is applicable where a service road is taken,⁵⁹ or where an approach from a new road will tie back into an old road.⁶⁰ The court held that the trial judge properly excluded such testimony in *Jennings v. Commonwealth*,

⁵⁵ 385 S.W.2d 776 (Ky. 1964).

⁵⁶ 363 S.W.2d 104 (Ky. 1962).

⁵⁷ *Commonwealth, Dep't of Highways v. Prewitt*, 390 S.W.2d 898 (Ky. 1965); *Commonwealth, Dep't of Highways v. Fancher*, 389 S.W.2d 164 (Ky. 1965); *Commonwealth, Dep't of Highways v. Roberts*, 388 S.W.2d 604 (Ky. 1965); *Commonwealth, Dep't of Highways v. Lawton*, 386 S.W.2d 466 (Ky. 1965); *Commonwealth, Dep't of Highways v. Yates*, 383 S.W.2d 340 (Ky. 1964).

⁵⁸ *Supra* note 57.

⁵⁹ *Commonwealth v. Roberts, supra* note 57.

⁶⁰ *Commonwealth, Dep't of Highways v. Callihan*, 391 S.W.2d 374 (Ky. 1965).

Dep't. of Highways,⁶¹ where appellants' land would have the same access after the condemnation as before.

It was stated, in *Commonwealth, Dep't. of Highways v. Yates*,⁶² that the jury's view of the property would not correct an error committed by the trial court in allowing testimony relative to a non-compensable item. The court therefore, in essence, overruled three previous cases.⁶³

The element of personal inconvenience or circuitry of travel is also a noncompensable item. The court handed down four cases relative to this problem.⁶⁴ One of them simply stated that it was prejudicial error to allow evidence which determined the damages to appellee's land partially on the basis of the difficulty with which movement between two severed tracts must be made.⁶⁵ In *Commonwealth, Dep't. of Highways v. Roberts*,⁶⁶ all of the witnesses for appellees stressed personal inconvenience to the owner in crossing the new road to operate the farm after the taking. The court cited *Commonwealth, Dep't. of Highways v. Herndon*⁶⁷ as authority for the proposition that inconvenience to the owners is not a proper element of damage, and held that only as the severance affects market value of the remaining land may it be considered compensable. This complies with the *Sherrod* requirement that factors bearing on diminution of value should be addressed to how they will affect market value and not how they will hurt the owner or make less advantageous the use of the property for his particular purposes.⁶⁸ The Commonwealth objected to evidence of circuitry of travel in *Commonwealth, Dep't. of Highways v. Brown*,⁶⁹ but the court was satisfied that the witnesses here did not relate their evidence to circuitry of travel as such, but directed this evidence to the destruction of the farm's unity.

A similar situation was presented in *Commonwealth, Dep't. of Highways v. Burns*.⁷⁰ The court cited *Brown* and used the following

⁶¹ 388 S.W.2d 133 (Ky. 1965).

⁶² *Commonwealth, Dep't. of Highways v. Yates*, 383 S.W.2d 340 (Ky. 1964).

⁶³ *Commonwealth, Dep't. of Highways v. Heath*, 354 S.W.2d 752 (Ky. 1962); *City of Winchester v. Spencer*, 352 S.W.2d 929 (Ky. 1962); *Bailey v. Harlan County*, 280 Ky. 247, 133 S.W.2d 58 (1939).

⁶⁴ *Commonwealth, Dep't. of Highways v. Burns*, 394 S.W.2d 923 (Ky. 1965); *Commonwealth, Dep't. of Highways v. Brown*, 392 S.W.2d 50 (Ky. 1965); *Commonwealth, Dep't. of Highways v. Roberts*, 390 S.W.2d 155 (Ky. 1965); *Commonwealth, Dep't. of Highways v. Fancher*, 389 S.W.2d 164 (Ky. 1965).

⁶⁵ *Commonwealth v. Fancher*, *supra* note 64.

⁶⁶ 390 S.W.2d 155 (Ky. 1965).

⁶⁷ 378 S.W.2d 620 (Ky. 1964).

⁶⁸ *Commonwealth, Dep't. of Highways v. Sherrod*, 367 S.W.2d 844 (Ky. 1963).

⁶⁹ 392 S.W.2d 50 (Ky. 1965).

⁷⁰ 394 S.W.2d 923 (Ky. 1965).

language: "the kind of circuitry of travel that is a noncompensable factor is travel from the landowner's property to other places on the highways system—not travel from one place on the landowner's property to another place on the same property."⁷¹

It is submitted that this language is unfortunate because it implies that travel from one place on the landowner's property to another place on the same property is a compensable factor. If this method of evaluating remainders does not collide with the *Sherrod* and *Tyree* rule, it at least liberalizes the rule to a great extent. Ironically, the court then proceeded to restate the correct rule of *Sherrod* and *Tyree*. In using strict *Sherrod* language, the court stated:

We think it should be made clear that in situations such as here presented, where a farm has been severed into separate parcels, the "after" value should be based *solely* on what exists after the taking, without regard to what existed before the taking; *the question is not how much did the taking do by way of damage to the original farm but what was the value of the farm before the taking and what is the value of the parcels that remain.* (Emphasis added.)⁷²

It is clear that the remainder is to be evaluated strictly on what now remains with no concern toward what previously existed—just as if a total stranger to the property fixes the after value. The following language in the *Burns* case unfortunately indicates that the non-feasibility of operating a severed farm as a single unit has some relevance:

The fact that the separate parcels into which the farm has been split cannot feasibly be operated as a single unit has no relevance *except as may be given as a value-affecting factor by a witness who testified that the separated parcels would bring less on the market, sold as separate parcels, than they would bring if they could be sold as a single unit.* (Emphasis added.)⁷³

Since the italicized language would permit this noncompensable item to be admitted, there is danger that a jury might consider this element relevant as a damage factor and allow compensation for it, even in the face of an admonition.

(b) *Loss of Business*

In *Commonwealth, Dep't. of Highways v. York*,⁷⁴ the condemned property was a motel site which had been placed in a position between a new road and an old one. The court stated the familiar principle that regardless of how lucrative an individual's business is, if it depends upon the flow of traffic by his property, he is entitled to

⁷¹ *Id.* at 925.

⁷² *Id.* at 925-26.

⁷³ *Ibid.*

⁷⁴ 390 S.W.2d 190 (Ky. 1965).

no recovery for loss of business or value of his property when that traffic is diverted along another route.⁷⁵ This proposition was used to support the court's ruling that it was reversible error for the lower court to instruct the jury that it should visit the site and implement what was seen, with other evidence, and that what they saw was evidence. Since diversion of traffic was most obvious to the jury on inspection of the premises, an instruction on diversion of traffic should have been given. This point had never been raised in Kentucky before.

The rule that evidence pertaining to loss of business is inadmissible was held not to be violated in *Commonwealth, Dep't. of Highways v. Smith*.⁷⁶ Evidence that the highest and best use of the property had been as a restaurant was held properly admissible because the evidence addressed itself to destruction of the land's availability for the very business admitted to be the highest and best use for which the property had been available.

It was pointed out in *Commonwealth, Dep't. of Highways v. Priest*,⁷⁷ that it is not proper to present evidence as to specific types of businesses which might use a lot, with a view to showing loss of future profits to the owner, because a particular business may no longer be placed on the remaining land.

Business losses resulting from construction operations are likewise noncompensable.⁷⁸ The taking of a temporary easement for construction work does not give the owner any special right to damages caused by the work. The proper standard is the diminution in the fair rental value of the landowner's adjacent property by reason of the occupancy by the Commonwealth. Moreover, it is improper to introduce photographs showing construction conditions during use of the temporary easement for the purpose of showing the disruption of the condemnee's business.⁷⁹

(c) Adaptability—Prospective Lot Value

In *Commonwealth, Dep't of Highways v. Merrill*,⁸⁰ the landowner used a map upon which different areas of his farm were shown along

⁷⁵ *Commonwealth, Dep't of Highways v. Slusher*, 371 S.W.2d 851 (Ky. 1963); *DeRosette v. Jefferson County*, 288 Ky. 407, 156 S.W.2d 165 (1941).

⁷⁶ 390 S.W.2d 194 (Ky. 1965).

⁷⁷ 387 S.W.2d 302 (Ky. 1965).

⁷⁸ *Commonwealth, Dep't of Highways v. Ray*, 392 S.W.2d 665 (Ky. 1965).

⁷⁹ *Commonwealth v. Ray*, *supra* note 78. *Commonwealth, Dep't of Highways v. Staples*, 388 S.W.2d 374 (Ky. 1965); *Commonwealth, Dep't of Highways v. Fister*, 373 S.W.2d 720 (Ky. 1963). The *Ray* case would allow the photographs for a legitimate purpose, *i.e.*, to show new pavement lines and the permanent physical conditions affecting the property when the reconstructed highway is completed. In such a case the court should admonish the jury that the disruption may not be considered in the award for damages.

⁸⁰ 383 S.W.2d 327 (Ky. 1964).

with the values which he assigned to each in his testimony. The Commonwealth objected to the designation of these areas and to the notations of value. The court held that since it was shown that the landowner's farm was reasonably adaptable for the uses shown, it was competent for him to premise the before and after value of his land on the value of each area. The court cited the *Merrill* case with approval in another case where the condemned property was suitable for potential commercial, residential, and light industrial purposes.⁸¹

Where the highest and best use of property is in sharp dispute, a jury question is presented.⁸² Even though land is undeveloped at the time, the jury may give credit to evidence of adaptability for commercial and residential use in arriving at before value.

The court, in *Commonwealth, Dep't. of Highways v. Ochsner*,⁸³ held it proper to assign "per lot" values to farmland, even though it had not been developed as a subdivision, and then to compare the lots on an "as is" basis with lots in comparable locations.

Testimony which emphasizes as a basis for valuation loss of access and the availability of the property for commercial use must be supported by evidence that businesses are planned in the foreseeable future or that subdivision of the property is planned soon.⁸⁴ The court stated: "The valuation which controls is the value at the time of the taking—in this case, as residential or farm property unless it can be shown that it is transitional property reasonably expected to be soon used as business property."⁸⁵

Evidence as to the adaptability of property for particular uses is subject to the limitation set forth in *Commonwealth, Dep't. of Highways v. Gearhart*, where the court stated:

Our cases have consistently observed the rule that it is appropriate to admit testimony of the adaptability of property for particular uses, even though the property is not then being so used. However, the rule is subject to the qualification that if the land is reasonably adaptable to another use, there must be an expectation or probability in the near future that it can or will be so used.⁸⁶

Testimony of prospective lot values has been rejected in two recent cases.⁸⁷ In *Commonwealth, Dep't. of Highways v. Lawton*, the property owners introduced a plat showing part of the farm subdivided into

⁸¹ *Commonwealth, Dep't of Highways v. Rhea*, 386 S.W.2d 443 (Ky. 1965).

⁸² *Commonwealth, Dep't of Highways v. Ramsey*, 388 S.W.2d 610 (Ky. 1965).

⁸³ 392 S.W.2d 446 (Ky. 1965).

⁸⁴ *Commonwealth, Dep't of Highways v. Riley*, 388 S.W.2d 129 (Ky. 1965).

⁸⁵ *Id.* at 129.

⁸⁶ 383 S.W.2d 922, 926 (Ky. 1964).

⁸⁷ *United Fuel Gas Co. v. Clarke*, 387 S.W.2d 845 (Ky. 1965); *Commonwealth, Dep't of Highways v. Lawton*, 386 S.W.2d 466 (Ky. 1965).

lots and then substantially based their testimony on prospective lot values. This type of testimony was incompetent and prejudicial, although the plat was admissible to show the susceptibility of the land to this type of development. In *United Fuel Gas Co. v. Clarke*,⁸⁸ the court rejected testimony that a portion of appellees' farm was susceptible of being land off into eight building lots, each worth 1,000 dollars.

In a recent case of first impression,⁸⁹ the court applied an exception to the rule that market value shall be determined by consideration only of the uses for which the land is adapted and for which it is available. The exception is that if the land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a reasonable probability of a change in the near future in the zoning ordinance or other restriction, then the effect of such probability upon the minds of the purchasers generally may be taken into consideration in fixing the present market value.

The Commonwealth unsuccessfully maintained, in *Commonwealth, Dep't. of Highways v. Phillips*,⁹⁰ that since the remaining property could best be used for commercial purposes, the owner did not suffer substantial damage in regard to that commercial use. The land was being used for residential purposes and the court held that before and after value should be based on *present* use of land.

Although estimates of land may be based on its availability for other uses, it is clear that a verdict may not be based on its worth by virtue of two inconsistent uses.⁹¹ Such an example of two inconsistent uses is farming and strip mining the same property.⁹²

(d) Other Incompetent Factors

In *Commonwealth, Dep't. of Highways v. Martin*,⁹³ the court applied the principle set forth in *Graves v. Winer*,⁹⁴ that evidence of offers to purchase is not competent. Likewise, personal worth, as distinguished from market value, is an improper consideration.⁹⁵ Al-

⁸⁸ *Supra* note 87.

⁸⁹ *Chitwood v. Commonwealth, Dep't of Highways*, 391 S.W.2d 381 (Ky. 1965). This point had been raised, but not decided in *Tharp v. Urban Renewal and Community Dev. Agency of the City of Paducah*, 389 S.W.2d 453 (Ky. 1965).

⁹⁰ 391 S.W.2d 377 (Ky. 1965).

⁹¹ *Commonwealth, Dep't of Highways v. Burden*, 388 S.W.2d 577 (Ky. 1965).

⁹² *Ibid.*

⁹³ 392 S.W.2d 64 (Ky. 1965).

⁹⁴ 351 S.W.2d 193 (Ky. 1961).

⁹⁵ *Commonwealth, Dep't of Highways v. Martin*, 392 S.W.2d 64 (Ky. 1965); *Commonwealth, Dep't of Highways v. Darch*, 390 S.W.2d 649 (Ky. 1965); and *Commonwealth, Dep't of Highways v. Darch*, 374 S.W.2d 490 (Ky. 1964).

though the court pointed out in the first trial of *Commonwealth, Dep't. of Highways v. Darch*⁹⁶ that such testimony was improper, Darch repeated his mistake at the second trial.

Following the *Sherrod* case, *Chain Belt Co. v. Commonwealth, Dep't. of Highways*⁹⁷ will be cited for the proposition that the condemnee is not entitled to compensation for removal and relocation expenses. Under *Sherrod*, this is not a taking of property. *Commonwealth, Dep't. of Highways v. Eaves*⁹⁸ cited *Chain Belt* as authority for this principle.

In accord with the rule that evidence of productivity of land based on actual income is inadmissible, the court, in *Commonwealth, Dep't. of Highways v. Prater*,⁹⁹ held that a landowner may not use as a basis for his opinion on market value the income derived from sale of tobacco raised on the property.

(e) *Elimination of Improper Factors*

In *Commonwealth, Dep't. of Highways v. Mayes*,¹⁰⁰ a professional real estate man, as witness for landowner, took into consideration the improper factor of loss of parking on the public way. Instead of striking his testimony, the trial court admonished the jury to disregard the testimony, since freedom to park on the highway is only a permissive privilege. The witness was permitted to "recast" his testimony to explain away his inadvertence. Even though the witness *did not alter his figures*, the court affirmed, stating that this is a matter of weight and credibility rather than competence of his testimony. Once the witness was permitted to recast his testimony, it is submitted that the trial court erred in not compelling the witness to revise his figures accordingly. If his figures are not revised, then his recast testimony has no effect, since a portion of his figures are still based on an incompetent factor.

The court applied the *Mayes* rule in *Commonwealth, Dep't. of Highways v. Shaw*,¹⁰¹ and held that when the improper factor can be eliminated from his calculations and the estimate revised accordingly, the appropriate remedy is an admonition to the jury not to consider the improper factor and a requirement of the witness that he revise his figures and give an opinion on the correct basis. Although a blanket motion to strike is inappropriate in such a case, the trial court could of its own motion admonish the jury and require the witness to

⁹⁶ 374 S.W.2d 490 (Ky. 1964).

⁹⁷ 391 S.W.2d 357 (Ky. 1965).

⁹⁸ 388 S.W.2d 573 (Ky. 1965).

⁹⁹ 384 S.W.2d 306 (Ky. 1964).

¹⁰⁰ 388 S.W.2d 125 (Ky. 1965).

¹⁰¹ 390 S.W.2d 161 (Ky. 1965).

eliminate the improper factor and revise his estimates accordingly. Where the improper factor is the sole or primary basis of a witness' opinion, it is subject to a motion to strike, but where other proper factors are employed the rule does not necessarily follow.¹⁰²

If a witness uses an incompetent factor on direct examination and on cross-examination the appellant elicits a similar statement, a motion to strike that testimony should be given effect.¹⁰³

If a verdict appears excessive it reflects the overall impact of erroneous evidence. Such trial errors are most persuasive, because the jury has apparently been misled and the Commonwealth prejudiced. The court, in upholding a verdict, often looks at the reasonableness of the verdict as determinative of the fact that the jury did not give great weight to noncompensable factors.¹⁰⁴

2. Excessiveness

An award is often subject to attack where the evidence lacks sufficient probative value, and the award is therefore excessive under the *Tyree* rule.¹⁰⁵ Such was the case in *Commonwealth, Dep't of Highways v. Oliver*,¹⁰⁶ where expert witnesses failed to disclose a sound basis for their opinions. In *Commonwealth, Dep't. of Highways v. Wheat*,¹⁰⁷ an opinion was made on the basis of sales of land in an admittedly more valuable section of the community. Condemnee's land was valued at 4.25 dollars or more per square foot, whereas identical tracts of land to that taken had sold for 2.33 dollars and 2.93 dollars per square foot, respectively. This testimony was held not to have sufficient probative value to support the opinion.

If there are minerals underlying condemned property, there must be evidence adduced to show that they have commercial value, or an award which is partly based on the value of these minerals will be set aside for lack of probative value.¹⁰⁸

A verdict is clearly excessive where the award for the thirty acres

¹⁰² *Commonwealth, Dep't of Highways v. York*, 390 S.W.2d 190 (Ky. 1965); *West Kentucky Coal Co. v. Commonwealth, Dep't of Highways*, 368 S.W.2d 738 (Ky. 1963).

¹⁰³ *Commonwealth, Dep't of Highways v. Napier*, 387 S.W.2d 861 (Ky. 1965).

¹⁰⁴ *Commonwealth, Dep't of Highways v. Shepherd*, 392 S.W.2d 58 (Ky. 1965); and *Commonwealth, Dep't of Highways v. Osborne*, 387 S.W.2d 854 (Ky. 1965).

¹⁰⁵ *Commonwealth, Dep't of Highways v. Darch*, 390 S.W.2d 649 (Ky. 1965); *Commonwealth, Dep't of Highways v. Arnett*, 390 S.W.2d 187 (Ky. 1965); *Commonwealth, Dep't of Highways v. Williams*, 383 S.W.2d 687 (Ky. 1964).

¹⁰⁶ 385 S.W.2d 173 (Ky. 1964).

¹⁰⁷ 387 S.W.2d 856 (Ky. 1965).

¹⁰⁸ *Commonwealth, Dep't of Highways v. Gardner*, 388 S.W.2d 360 (Ky. 1965).

taken plus incidental damages is more than twice the amount fixed as the after value of the remaining 105 acres of the farm, which have more and better improvements and higher proportions of coal and of bottom and hill lands with better access.¹⁰⁹

The court often employs a mathematical test to find excessiveness.

In *Commonwealth, Dep't. of Highways v. Staples*,¹¹⁰ the court found the value per square foot of the property, based on the highest before value of appellee's witness. This came to 1.88 dollars per square foot for the entire lot. At that rate the 450 square feet taken amounted to only 846 dollars. The jury awarded 14.82 dollars per square foot or a verdict of 6,675 dollars. The award was ruled excessive.

A verdict will obviously be declared excessive where the Commonwealth utilizes its own right of way for extension of the highway pavement to its right of way line and the award is based partially on the taking of the Commonwealth's own property.¹¹¹

The court upheld a verdict as not excessive in *Commonwealth, Dep't. of Highways v. Vanderpool*,¹¹² where approximately one-half of condemnee's farm was valued at more than twice the assessed value for tax purposes, but the Commonwealth's witnesses valued it at seven times the assessed value.

In *Commonwealth, Dep't. of Highways v. Terry*,¹¹³ an award of 16,000 dollars was not considered excessive for the taking of 1.41 acres of farmland on which was located a five-room frame house with forced-air furnace and up-to-date plumbing and wiring.

Where there is conflict in evidence as to whether minerals may be feasibly mined, a verdict based on the merchantability of the minerals will not be set aside if reasonable.¹¹⁴

The court held, in *Commonwealth, Dep't of Highways v. Vaughn*,¹¹⁵ that where the total amount of a judgment, which was approximately two-thirds of the amount of estimated damage of the lowest of the landowner's appraisals and about one-half that of the others, was based on the testimony of qualified appraisers and supported thereby by evidence, the award was valid. Similarly, an award of 9,000 dollars has been held not excessive where witnesses for the landowner estimated

¹⁰⁹ *Commonwealth, Dep't of Highways v. George*, 387 S.W.2d 580 (Ky. 1965).

¹¹⁰ 388 S.W.2d 374 (Ky. 1965).

¹¹¹ *Commonwealth, Dep't of Highways v. Ray*, 392 S.W.2d 665 (Ky. 1965).

¹¹² 385 S.W.2d 210 (Ky. 1964).

¹¹³ 387 S.W.2d 874 (Ky. 1965).

¹¹⁴ *Commonwealth, Dep't of Highways v. Tucker*, 389 S.W.2d 937 (Ky. 1965).

¹¹⁵ 390 S.W.2d 146 (Ky. 1965).

the reduction in market value from a low of 10,500 dollars to a high of 16,000 dollars.¹¹⁶

In *Commonwealth, Dep't of Highways v. Parker*,¹¹⁷ the jury split the difference and awarded a verdict of 12,305 dollars. Appellee's witnesses testified that the difference was from 17,869 to 22,500 dollars, and appellant's testimony set the figure at 1,200 to 2,500 dollars. The verdict was held not excessive.

3. Miscellaneous

In *Commonwealth, Dep't of Highways v. Caudill*,¹¹⁸ the court held that where the chief value of the taken land was its road frontage and this factor was revealed in the amount of damages returned for the land taken [case was tried before *Sherrod*], loss of the use of the commercially usable frontage as the main factor tending to reduce the value of the remaining land was a duplication of damages which necessitated a reversal.

The condemnor took a bridge in *Commonwealth, Dep't of Highways v. Adams*,¹¹⁹ and the trial court admitted evidence as to the cost of constructing a new bridge, over the objection of condemnor, but subsequently struck the evidence and admonished the jury not to consider it. It was held that the trial court erred in admitting the evidence of double damage, but the trial court's action in excluding the evidence eliminated condemnor's argument as to double damage.

Tried before *Sherrod*, the court held in *Commonwealth, Dep't of Highways v. Pruitt*,¹²⁰ that where separate awards were made for taking damages and resulting damages, such award could not exceed the top limits of valuation testimony. The court, in *Commonwealth, Dep't of Highways v. Allie*,¹²¹ held that a verdict may be within the range of evidence even if it is less than the lowest difference between before and after values given by any individual witness. The reason is that the jury has a right to rely on the lowest before value given by a witness and the highest after value given by another witness.¹²²

In another pre-*Sherrod* case¹²³ it was held that where the commissioners' award itemized the damages, the landowner, although not

¹¹⁶ *Commonwealth, Dep't of Highways v. Ward*, 388 S.W.2d 119 (Ky. 1965).

¹¹⁷ 388 S.W.2d 366 (Ky. 1965).

¹¹⁸ 388 S.W. 2d 376 (Ky. 1965).

¹¹⁹ 388 S.W.2d 569 (Ky. 1965).

¹²⁰ 386 S.W.2d 261 (Ky. 1965).

¹²¹ 391 S.W.2d 385 (Ky. 1965).

¹²² *Chitwood v. Commonwealth, Dep't of Highways*, 391 S.W.2d 381 (Ky. 1965).

¹²³ *Commonwealth, Dep't of Highways v. Dearen*, 392 S.W.2d 49 (Ky. 1965).

appealing this award, could receive an amount in excess of the amount allocated to the value of the property taken.

Following *Commonwealth, Dep't of Highways v. Stamper*,¹²⁴ the court, in *Commonwealth, Dep't of Highways v. Wireman*,¹²⁵ applied the principle that a before value figure cannot be based upon itemizing separate values of existing improvements.

Although undepreciated replacement cost is an improper method of determining damages, the court has recently held that such evidence, even though improper, may not be prejudicial where taken in connection with evidence concerning depreciation of the original building.¹²⁶

The court held, in *Commonwealth, Dep't of Highways v. Polk*,¹²⁷ that where the lessee of condemned property had the right to remove a building constructed on the premises by him, the building was not, for the purposes of a condemnation action, personal property, and evidence of damage to the building had to be admitted.

*Commonwealth, Dep't of Highways v. Chapman*¹²⁸ set out the method by which the separate estates of different owners is to be determined. In this case, one group of heirs owned the surface and another owned the mineral interest. The proper method, in such a situation, is to allow evidence of separate values and submit the entire question to one jury. A verdict may be returned finding the fair market value of the whole property with the minerals in place and a separate verdict as to the value of the mineral interest.

B. EVIDENCE

1. Comparable Sales

In *Commonwealth, Dep't of Highways v. Merrill*,¹²⁹ witnesses for condemnee testified to prices paid in three comparable sales which occurred two to four months after the taking. The court cited the *Begley* rule¹³⁰ as to comparable sales and held that the Commonwealth did not produce any evidence of a prejudicial change in property valuation within four months after the taking, and therefore the trial

¹²⁴ 345 S.W.2d 640 (Ky. 1961).

¹²⁵ 388 S.W.2d 606 (Ky. 1965).

¹²⁶ *Commonwealth, Dep't of Highways v. Congregation Anshei S'Fard*, 390 S.W.2d 454 (Ky. 1965).

¹²⁷ 389 S.W.2d 928 (Ky. 1965).

¹²⁸ 391 S.W.2d 367 (Ky. 1965).

¹²⁹ 383 S.W.2d 327 (Ky. 1964).

¹³⁰ *Commonwealth, Dep't of Highways v. Begley*, 272 Ky. 289, 114 S.W.2d 127 (1938). The court approved evidence of "sales of land of like character, similarly situated and at a point of time not too remote."

judge had not abused his discretion in allowing the witnesses to testify concerning those particular sales.

The court pointed out, in *Commonwealth, Dep't of Highways v. Mann*,¹³¹ that great latitude is allowed a professionally qualified witness in condemnation proceedings as to comparability of prior sales. Refusal to permit evidence of prices recently paid in private sales of comparable property is reversible error if prejudicial. Dissimilarities should be pointed out on cross-examination. Such refusal to admit was held prejudicial in two other recent cases.¹³²

Comparable sales, the prices of which are based on hearsay, are clearly inadmissible.¹³³ The court has, moreover, recently reaffirmed the rule that a land transaction made under threat of condemnation is inadmissible as a comparable sale.¹³⁴ Such a sale does not meet the fair market value definition.¹³⁵

2. Miscellaneous

The court held, in *Commonwealth, Dep't of Highways v. Robinette*,¹³⁶ that the fact that the Commonwealth introduced the presence of coal, for the purpose of showing its unmineability, did not justify the landowners in pursuing the subject for the purpose of adding the value of the coal to the value of the land.

On the basis of *Tyree*, the court, in *Commonwealth, Dep't of Highways v. Whipple*,¹³⁷ held that where the taken property was renting for 1,200 dollars per month and there was evidence that a couple of years before the condemnation the property had rented for 1,500 dollars per month, the testimony of a valuation witness that the property had a rental value of 1,560 dollars per month was not so outlandish and fantastic as to render his testimony completely valueless.

C. WITNESSES

The court, in *Commonwealth, Dep't of Highways v. Wiman*,¹³⁸ held that even though the landowner did not qualify under the *Fister*

¹³¹ 387 S.W.2d 848 (Ky. 1965).

¹³² *Commonwealth, Dep't of Highways v. Hobson*, 384 S.W.2d 314 (Ky. 1964); *Commonwealth, Dep't of Highways v. West*, 383 S.W.2d 116 (Ky. 1964).

¹³³ *Commonwealth, Dep't of Highways v. Bond*, 391 S.W.2d 692 (Ky. 1965).

¹³⁴ *Commonwealth, Dep't of Highways v. Transamerican Freight Lines, Inc.*, 388 S.W.2d 574 (Ky. 1965).

¹³⁵ 1 Stanley, *Instructions to Juries* § 360 (2d ed. 1957): "The market value is the price which it (the subject property) will bring when it is offered for sale by one who desires to sell, *but is not compelled to do so*, and is bought by one who desires to purchase, *but is not compelled to have it*. (Emphasis added.)

¹³⁶ 386 S.W.2d 719 (Ky. 1965).

¹³⁷ 392 S.W.2d 81 (Ky. 1965).

¹³⁸ 383 S.W.2d 371 (Ky. 1964).

rule,¹³⁹ the verdict might stand if a highly qualified witness supported it by his testimony.

In *Commonwealth, Dep't of Highways v. Rose*,¹⁴⁰ the court affirmed an award for condemnees based upon probative value of two witnesses whose personal experience qualified them as expert witnesses. The fact that they did not testify as to acreage, type of land, or purchase price of the sales was not reversible error because the Commonwealth did not challenge them on cross-examination; therefore, appellant cannot be heard to complain on appeal. Even though witnesses do not testify to comparable sales, if it is apparent to the court that they possess such knowledge of land values in the vicinity as to warrant their giving evidence touching that point, their testimony is of probative value.¹⁴¹

A witness has been held unqualified to testify when he has not bought or sold any real estate, but has "seen it" sold, and has heard of one sale and "just different places all up and down the road."¹⁴² A witness' status as an expert also becomes unreliable when he gives opinions of the amounts of damages which are glaringly contradictory. In such a case his testimony should be stricken upon a proper motion.¹⁴³

The court, in *Commonwealth, Dep't of Highways v. Bennett*,¹⁴⁴ held that the definition of fair market value may be read to a lay witness, and it is not reversible error if such a witness is unable to give such a definition.

A witness who has had wide experience in coal mining and in purchasing coal properties has been held sufficiently qualified to express an opinion regarding the value before and after the taking of a strip of land underlain with merchantable coal.¹⁴⁵

The trial court, in *Commonwealth, Dep't of Highways v. Combs*,¹⁴⁶ excused a witness who had served as one of the commissioners, and then admonished the jury to disregard his testimony. The court

¹³⁹ *Commonwealth, Dep't of Highways v. Fister*, 373 S.W.2d 720 (Ky. 1963), substantially changed the rule that mere ownership of the property qualified the landowner to render an opinion concerning its market value. The owner of real estate is no longer presumed adequately qualified to express an opinion of market value by reason of ownership alone; he must now initially establish his qualifications.

¹⁴⁰ 384 S.W.2d 81 (Ky. 1964).

¹⁴¹ *Commonwealth, Dep't of Highways v. Merriman*, 392 S.W.2d 661 (Ky. 1965).

¹⁴² *Commonwealth, Dep't of Highways v. Belk*, 389 S.W.2d 920 (Ky. 1965).

¹⁴³ *Commonwealth, Dep't of Highways v. Terry*, 387 S.W.2d 281 (Ky. 1965).

¹⁴⁴ 387 S.W.2d 594 (Ky. 1965).

¹⁴⁵ *Commonwealth, Dep't of Highways v. Snyder*, 390 S.W.2d 659 (Ky. 1965).

¹⁴⁶ 387 S.W.2d 592 (Ky. 1965).

ruled that the trial judge erred, thus following *Commonwealth, Dep't of Highways v. Evans*,¹⁴⁷ which held that a commissioner may give valuation testimony so long as he does not indicate the amount of the county court judgment. However, this practice is not allowed where the circumstances are such that the commissioners, on appointment, might anticipate employment as witnesses.¹⁴⁸ This practice was not shown in the *Combs* case.

D. PROCEDURE

Three cases involved the jury function in condemnation cases. In *Commonwealth, Dep't of Highways v. Hackworth*,¹⁴⁹ the trial court refused to allow the jury to view a residence which had been located on the property, but which had since been moved 2000 feet away. The court held it error not to hold a preliminary hearing to determine whether the residence was so changed as to make jury view useless.

A statement by condemnee's counsel in his closing argument caused the court to reverse an award in *Commonwealth, Dep't of Highways v. Dowdy*.¹⁵⁰ The court had correctly instructed the jury to disregard loss of business as an improper element of damages. Counsel then told the jury: "The law is an ass—a idiot," causing the jury to indirectly award improper damages in their verdict.

Prejudice of the jury was the issue in *Butler v. Commonwealth, Dep't of Highways*.¹⁵¹ The court granted a new trial even though the prejudice was not brought to light until after the close of the trial. Condemnor's witness had testified that the land was worth 850 dollars per acre and condemnee's witness had testified to a value of 2,000 dollars per acre. While the judge was out of the courtroom hearing an objection, one of the jurors was heard to remark, "No land out there is worth 2,000 dollars per acre."

Four cases dealt with appeal procedure.

In *Commonwealth, Dep't of Highways v. Hatcher*,¹⁵² the court held that failure of the trial court to give plaintiff notice of entry of a dismissal order, as provided for under CR 77.04¹⁵³ does not affect the validity of the dismissal order nor toll the time limit for appeal.

¹⁴⁷ 361 S.W.2d 766 (Ky. 1962).

¹⁴⁸ *Gulledge v. Texas Gas Transmission Corp.*, 256 S.W.2d 349 (Ky. 1953); *Tennessee Gas Transmission Co. v. Million*, 314 Ky. 137, 234 S.W.2d 153 (1950).

¹⁴⁹ 383 S.W.2d 372 (Ky. 1964).

¹⁵⁰ 388 S.W.2d 593 (Ky. 1965).

¹⁵¹ 387 S.W.2d 867 (Ky. 1965).

¹⁵² 386 S.W.2d 262 (Ky. 1965).

¹⁵³ CR 77.04 states: "[the] circuit clerk shall serve a notice of the entry by mail . . . (4) Failure . . . of the clerk to serve such notice . . . shall not affect the validity of the judgement. . . ."

The committee for an incompetent person was held not to be a necessary party to an appeal in *Commonwealth, Dep't of Highways v. Harkness*.¹⁵⁴ Therefore, failure of the Commonwealth to name the committee in a statement of appeal is not fatal error. CR 4.04(3), providing for service upon the committee of an incompetent, if known, was held not to render the committee a necessary party. The court also held a prior judgment against the incompetent voidable because it had been rendered *without proof* on behalf of the Commonwealth after the guardian ad litem reported that he was unable to make a defense.¹⁵⁵

Failure to raise objection at trial was fatal to the Department of Highways in *Commonwealth, Dep't of Highways v. Brock*.¹⁵⁶ The plaintiff filed suit against a construction company for damages caused by excessive blasting and the company subsequently joined the Department of Highways as a third party defendant. A verdict was rendered against the department even though the complaint was not amended until after the trial. The court, in holding that the department may not for the first time complain on appeal, cited CR 15.02, which provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

In *Commonwealth, Dep't of Highways v. Sangalli*,¹⁵⁷ the court held that merely filing a motion for appeal because the award was too high was not sufficient under KRS 177.087, which requires filing of a certified copy of the judgment, a statement of the parties and any exceptions to the commissioners' award.

In three cases, the appellee failed to file a brief on appeal. In each case the court gave judgment for the appellant under Rule of Kentucky Court of Appeals 1.260 [hereinafter cited as RCA].

In *Commonwealth, Dep't of Highways v. Win-Belt Co.*,¹⁵⁸ the court treated the failure as a confession of error under RCA 1.260¹⁵⁹ and rendered judgment for appellant without considering the merits of the case. Likewise, in *Commonwealth, Dep't of Highways v. Bennet*,¹⁶⁰ the court reversed without considering the merits of the case after the appellee failed to file his brief. Similarly, in *Commonwealth,*

¹⁵⁴ 383 S.W.2d 359 (Ky. 1964).

¹⁵⁵ CR 8.04 requires affirmative allegations against a person under disability to be proven whether denied in the pleadings or not.

¹⁵⁶ 391 S.W.2d 690 (Ky. 1965).

¹⁵⁷ 383 S.W.2d 674 (Ky. 1964).

¹⁵⁸ 386 S.W.2d 721 (Ky. 1965).

¹⁵⁹ RCA 1.260 states: "If the appellee fails to file his brief within the time allowed, the Court may: . . . (3) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case."

¹⁶⁰ 386 S.W.2d 733 (Ky. 1965).

Dep't of Highways v. Martin,¹⁰¹ the court invoked section 2 of RCA 1.260 which permits it to reverse if appellant's brief appears to sustain such action. The case was remanded for a new trial with instructions on errors committed at the first trial.

Two cases dealt with grounds for appeal.

In *Commonwealth, Dep't of Highways v. Miller*,¹⁰² the court dismissed the Commonwealth's appeal because the sum in controversy did not amount to the 2,500 dollars required in civil cases, under KRS 21.060, for appeal as a matter of right. The county court had awarded 1,385 dollars and the circuit court increased the award to 3,500 *without the Commonwealth joining in the appeal*. This had the effect of making the county court award non-reducible, and therefore, the only issue appealable was the *amount of increase* in circuit court.

In *Price v. Commonwealth Dep't of Highways*,¹⁰³ the court held that failure of the record to show that the commissioners were properly appointed and sworn by the county court was not fatal. The court assumed proper appointment and further stated that the matter was not material because the primary purpose of the county court proceeding in this case was to give possession to the Commonwealth pending trial on damages.

Two cases the court disposed of summarily. In *Commonwealth, Dep't of Highways v. Knight*,¹⁰⁴ the court found no error in the record and affirmed without stating the case; while in *Commonwealth, Dep't of Highways v. Parsons*,¹⁰⁵ the court set aside an increased award where only the condemnor appealed.

One case dealt with the penalty on appeal. The court held in *Commonwealth, Dep't of Highways v. Whipple*,¹⁰⁶ that the Commonwealth must pay an additional ten per cent damages on the amount of an increased award on appeal to circuit court. This reaffirmed the holding in *Commonwealth, Dep't of Highways v. Frank Fehr Brewing Co.*¹⁰⁷

E. NECESSITY

Necessary and proper public use was the issue in two cases. In *Sturgill v. Commonwealth, Dep't of Highways*,¹⁰⁸ the court held that the Commonwealth could condemn property to provide an access

¹⁰¹ 392 S.W.2d 64 (Ky. 1965).

¹⁰² 387 S.W.2d 297 (Ky. 1965).

¹⁰³ 385 S.W.2d 670 (Ky. 1965).

¹⁰⁴ 388 S.W.2d 120 (Ky. 1965).

¹⁰⁵ 383 S.W.2d 360 (Ky. 1964).

¹⁰⁶ 392 S.W.2d 81 (Ky. 1965).

¹⁰⁷ 376 S.W.2d 541 (Ky. 1964).

¹⁰⁸ 384 S.W.2d 89 (Ky. 1964).

road for adjacent property which had been landlocked by a new highway. Sufficient public purpose was found in the fact that the general public would have the right to use the road.

In *Commonwealth, Dep't of Highways v. Vanderstoll*,¹⁶⁹ the owner complained that more land had been taken than was necessary for the highway. The Commonwealth showed necessity for use in projects associated with the highway such as drainage, roadside parks, etc. It was held error for the trial court to rule for the owner since he failed to show fraud, bad faith, or abuse of discretion in the condemnation.

F. MISCELLANEOUS

In *Commonwealth, Dep't of Highways v. Alexander*,¹⁷⁰ KRS 177.060(1)¹⁷¹ was held to require the county to indemnify the Commonwealth for all claims arising out of primary highway work where there is no allegation of negligence by the Commonwealth. Similarly, in *Commonwealth, Dep't of Highways v. Thacker*,¹⁷² the county was held liable under KRS 177.060(1) for damage resulting from reconstruction of a primary road.

Power of an urban renewal agency to condemn was the issue in *Idol v. Knuckles*.¹⁷³ The court held that the trial court erred in granting an interlocutory judgment giving the urban renewal agency immediate possession without a hearing on the right of the agency to condemn the land as provided in KRS 99.420(5).¹⁷⁴

Hinderance of use was held to be a compensable taking in *Commonwealth, Dep't of Highways v. Williams*.¹⁷⁵ The owner's testimony that the condemnation had made it more costly to utilize the land for its purpose as grazing land because of difficulties in moving livestock between tracts was held admissible.

In *Commonwealth, Dep't of Highways v. De Hart*,¹⁷⁶ the court held that condemnation of an awning extending from the property over the right of way was not grounds for rescission of a deed to the property.

¹⁶⁹ 388 S.W.2d 358 (Ky. 1965).

¹⁷⁰ 388 S.W.2d 599 (Ky. 1965).

¹⁷¹ KRS 177.060(1) provides: "Except as otherwise provided in this section and in KRS 17.070, all cost of acquiring any necessary land or right of way for primary road purposes and all damages incurred shall be paid by the county."

¹⁷² 384 S.W.2d 79 (Ky. 1964).

¹⁷³ 383 S.W.2d 910 (Ky. 1964).

¹⁷⁴ KRS 99.420(5) states: "Any issue raised in the answer or other pleading filed, putting in issue the right of the agency to condemn the property shall be promptly heard and decided by the court . . ."

¹⁷⁵ 386 S.W.2d 722 (Ky. 1965).

¹⁷⁶ 385 S.W.2d 317 (Ky. 1964).

A mistaken survey came under fire in *Commonwealth, Dep't of Highways v. Schmeh*.¹⁷⁷ The condemned tract contained a house which was, unknown to either party, actually located only partially on the tract condemned. The remainder of the house was located on an adjacent tract owned by the same person. The deeds to the Commonwealth did not purport to convey anything but the tract condemned. The court held that the Commonwealth did not acquire any title to the part of the house on the adjacent tract, despite the fact that it based its offer on the assumption that the entire house was on the condemned tract and paid a correspondingly higher price.

In *Commonwealth, Dep't of Highways v. Holloman*,¹⁷⁸ a road was built through oil-producing lands. The condemnation provided that the owner could continue to extract oil and gas from under the road so long as he did not enter on the right of way to do so. The trial court admitted testimony that water flooding was required to produce oil on the owner's adjacent land and that this would not be possible because of the danger of rupture under the highway through improperly capped old wells. The court held that the owner could not recover damages for the loss of his other wells because of inability to water flood, for his own negligence in not properly capping the old wells as required by statute,¹⁷⁹ caused the situation.

The required form for a jury verdict was set out in *Commonwealth, Dep't of Highways v. Priest*.¹⁸⁰ The court held that the jury should be instructed to state in its verdict the fair market value of the entire tract before the taking and the fair market value of the remainder not taken.

G. REVERSE CONDEMNATION

In *Commonwealth, Dep't of Highways v. Widner*,¹⁸¹ the court allowed recovery in an action for damages on account of a landslide due to deprivation of lateral support. Appellants argued that recovery based on negligence should not be allowed in circuit court, but only in the Board of Claims. The court was unwilling to depart from its decisions allowing such recovery, even though some doubt had been expressed as to the soundness of the doctrine.¹⁸² It is clear that liability based on a theory of negligence in a reverse condemnation

¹⁷⁷ 388 S.W.2d 131 (Ky. 1965).

¹⁷⁸ 390 S.W.2d 666 (Ky. 1965).

¹⁷⁹ KRS 353.180(1) provides: "No person shall abandon . . . [a well] . . . without first plugging it in a secure manner . . . so that no water can pass. . . ."

¹⁸⁰ 387 S.W.2d 302 (Ky. 1965).

¹⁸¹ 388 S.W.2d 583 (Ky. 1965).

¹⁸² *Curlin v. Ashby*, 264 S.W.2d 671 (Ky. 1954).

action in circuit court will not be grounds for dismissing the action because of a lack of jurisdiction.

The court followed, but did not cite, the *Widner* case in *Commonwealth, Dep't of Highways v. Gisborne*.¹⁸³ The Kentucky Highway Department mistakenly cleared some right of way, and appellant maintained that this was a negligent trespass which should have been brought in the Board of Claims. The court said that it makes no difference whether property is condemned and appropriated for a public use, or is "injured or destroyed" for a public purpose, since the owner is entitled to compensation when any of these events occur. Although the court reasoned that this action amounted to a "taking" (in reverse), it refused to order that a deed be conveyed to the department. The court stated:

As the sole issue involved was the amount of compensation, if any, to be paid for the use of or injury to the strip of land, the trial court did not err when it refused to order that the strip be conveyed to the Department. *Admittedly there was no taking of the land itself; hence, there was no necessity for a deed.*¹⁸⁴ (Emphasis added.)

Judge Stewart has apparently distinguished between degrees of "taking." If the action of the department had amounted to a *permanent* deprivation of property (whether by negligence or otherwise), the court would have had no alternative but to order that a deed to that property be conveyed.

The court, in *Commonwealth, Dep't of Highways v. Davidson*,¹⁸⁵ reversed an award and held that no condemnation in reverse would lie where the Kentucky Highway Department did nothing beyond that allowed by right of way deeds.

¹⁸³ 391 S.W.2d 714 (Ky. 1965).

¹⁸⁴ *Id.* at 716.

¹⁸⁵ 383 S.W.2d 346 (Ky. 1964).

IV. CONSTITUTIONAL LAW

The Kentucky Court of Appeals considered eight cases involving constitutional law this session. Issues involved were: illegal search and seizure, personal immunity of members of the Kentucky General Assembly from arrest, public utility discrimination, sovereign immunity, annexation, taxation, appointed counsel, and criminal sentencing.

Probable cause for search and the extent of the premises subject to search was the issue in *Perkins v. Commonwealth*.¹⁸⁶ The court found that a search warrant issued on the basis of an affidavit of an Alcoholic Beverage Commission agent was not issued for probable cause as required by Kentucky Constitution section 10¹⁸⁷ because the affidavit failed to state a reputation for bootlegging activity on the premises or by the occupant. The court also indicated that even had the warrant been valid the officers could not legally search a car parked in front of the premises on the public highway in the absence of any evidence that its operator was a servant or associate of the occupant of the premises.

Arrest of a member of the Kentucky legislature was appealed in *Swope v. Commonwealth*.¹⁸⁸ The court found that personal immunity from arrest granted to members of the state legislature under the Kentucky Constitution¹⁸⁹ does not extend to breaches of the peace in a public place.

In *Consolidated Television Serv. Inc. v. Leary*¹⁹⁰ the contention was made that a public utility corporation could not constitutionally¹⁹¹ allow one cable television company to use its poles for wires and yet deny the same privilege to a competing cable television company. The court refused to order the issuance of an injunction finding that denial of use of the poles was not necessarily an unreasonable or arbitrary action by the Electric and Water Plant Board of Frankfort.

Immunity of the state from suit on civil contracts was the issue in *Wells v. Commonwealth, Dep't of Highways*.¹⁹² The court followed *Foley Const'r. Co. v. Ward*¹⁹³ and allowed the state to interpose the the defense of sovereign immunity to a breach of contract suit. Failure to specially plead the defense was held not a bar.

¹⁸⁶ 383 S.W.2d 916 (Ky. 1964).

¹⁸⁷ Ky. Const. § 10.

¹⁸⁸ 385 S.W.2d 57 (Ky. 1964).

¹⁸⁹ Ky. Const. § 43.

¹⁹⁰ 382 S.W.2d 78 (Ky. 1964).

¹⁹¹ Neither the constitutional sections nor the theory relied upon appear in the case report.

¹⁹² 384 S.W.2d 308 (Ky. 1964).

¹⁹³ 375 S.W.2d 392 (Ky. 1963).

The constitutionality of a statute limiting the right of appeal was attacked in *Jobe v. City of Erlanger*.¹⁹⁴ The provisions of KRS 81.190(4)¹⁹⁵ were attacked as a denial of due process¹⁹⁶ and a taking of property without just compensation,¹⁹⁷ because the statute denied any right of appeal from annexation cases in third class cities. The court rejected the contention that the classification under the statute was unreasonable or arbitrary and found such a classification was authorized under the Kentucky Constitution,¹⁹⁸ permitting the division of cities into classes for the purposes of organization and government. The dissent, however, felt that this was a case of denial of equal protection of the law under the federal constitution¹⁹⁹ because of arbitrary classification. Appeals are permitted in cities of the first, second, and fourth class and the dissent felt there to be no reasonable relationship between right to appeal and population of a city.

In *Woolsey v. Big Reedy Creek Watershed*²⁰⁰ a taxpayer asked injunctive relief against collection or expenditures of tax money for a watershed work plan which had been voted in a referendum pursuant to KRS 262.730.²⁰¹ The court pointed out that the plaintiff's pleading did not specify what grounds were relied upon but merely that his "constitutional rights" had somehow been violated. The court proceeded to supply its own constitutional argument on plaintiff's behalf which it then rejected as hypothetical in this case.²⁰² The court also refused to invalidate the referendum because it was not held on the day of a regular election as provided for under section 171 of the Kentucky Constitution.²⁰³ This section was held applicable only to state-wide referendums on acts of the legislature classifying property for tax purposes.

Right to assigned counsel for appeal was the issue in *Eastham v.*

¹⁹⁴ 383 S.W.2d 675 (Ky. 1964).

¹⁹⁵ KRS 81.190(4) states: "Any city of the third class may annex any territory . . . in the same manner . . . [as] cities of the first class with the following exceptions: . . . (4) There shall be no appeal from the judgment of the circuit court."

¹⁹⁶ Ky. Const. § 14.

¹⁹⁷ Ky. Const. § 13.

¹⁹⁸ Ky. Const. § 156.

¹⁹⁹ U.S. Const. amend. XIV.

²⁰⁰ 383 S.W.2d 135 (Ky. 1964).

²⁰¹ KRS 262.730 states: "Only owners of lands lying within the boundaries of the territory as determined by such board shall be eligible to vote in the referendum. . . ."

²⁰² That since each property owner gets one vote it would be possible for many small property owners to outvote a few large property owners even though their combined holdings were less. The court pointed out that the plaintiff was not so situated.

²⁰³ Ky. Const. § 171.

Commonwealth.²⁰⁴ The court held that an indigent has a right to appointed counsel to prosecute an *appeal* if he so requests it of the trial court and that a denial would deny equal protection of the law.²⁰⁵ Here the appeal was written by the defendant and there was no indication that he had asked the trial court to appoint counsel. The court did not decide the merits but remanded the case to the trial court to appoint counsel for appeal.

A writ of habeas corpus was denied in *Swanness v. Thomas*,²⁰⁶ over the contention of the defendant that his confinement at Eddyville Penitentiary was unlawful because the trial court had sentenced him to LaGrange. KRS 196.070²⁰⁷ and KRS 197.065,²⁰⁸ authorizing such transfers by correctional authorities, were held not to be a delegation of the power of the judiciary in violation of the Kentucky Constitution,²⁰⁹ because designation of the places where felons may be confined is a purely legislative function.

²⁰⁴ 383 S.W.2d 684 (Ky. 1964).

²⁰⁵ U.S. Const. amend. XIV.

²⁰⁶ 387 S.W.2d 307 (Ky. 1965).

²⁰⁷ KRS 196.070 reads: "The Director of the Division of Institutions shall: . . . (5) Authorize the transfer of male prisoners between institutions."

²⁰⁸ KRS 197.065(2) states: "Commissioner of Welfare is vested with the authority to direct and compel the transfer of any prisoner from any penal institution or reformatory, irrespective of the order of the court committing said prisoner to any one institution. . . ."

²⁰⁹ Ky. Const. §§ 27, 28, 29.

V. CONTRACTS

The court handed down several decisions involving such elements of contracts as: the validity of a contract when the offeree fails to sign but the subject matter is delivered and paid for; an agreement to agree; rules of damages in construction contracts; and the sufficiency of an undelivered deed to take an oral contract out of the Statute of Frauds.

In *O'Daniel Motors, Inc. v. Handy*,²¹⁰ a vendee signed a purchase order containing the provision "This Order is not Binding until Accepted by Dealer and Approved by His Credit Department." The purchaser made a down payment and took possession of the car, but the order was never signed by the dealer who now seeks return of the car. The court reaffirmed its position in holding that the contract was not binding until it was signed by the dealer. The court pointed out its ruling in a similar case, *Venters v. Stewart*,²¹¹ that the order received by a salesman with a comparable provision was only an offer to purchase and could not be binding on either party until accepted.

The court could have used the theory of implied contract and reached a different result. Acceptance of a contract may be implied from the acts of the parties and "an offeree who has unjustifiably led the offeror to believe that he had acquired a contractual right, should not be allowed to assert an actual intent at variance with the meaning of his acts."²¹²

The court for the first time was called on to determine the validity and enforceability of an "agreement to agree" in *Walker v. Keith*.²¹³ The case involved a ten-year lease with an option to renew and the rent to be fixed in an amount as actually agreed upon by the parties in accordance with a comparative basis of rental values and present business conditions as of the date of renewal.

The court had two basic theories from which to choose: first, the conservative, orthodox view that the rental is an essential term, and where it is not made certain or readily ascertainable, then it is not binding and unenforceable;²¹⁴ second, the more liberal approach that the parties' intentions should be carried out and that the determina-

²¹⁰ 390 S.W.2d 453 (Ky. 1965).

²¹¹ 261 S.W.2d 444 (Ky. 1953).

²¹² *Allied Steel v. Ford Motor Co.*, 277 F.2d 907, 911-12 (6th Cir. 1960); *Sheridan Coal Co. v. C. W. Hull Co.*, 87 Neb. 117, 127 N.W.218 (1910).

²¹³ 382 S.W.2d 198 (Ky. 1964).

²¹⁴ 1 Williston, *Contracts* § 45 (3rd Ed. 1957). See also *Slayter v. Pasley*, 199 Or. 616, 264 P.2d 444 (1953); *Moss v. Olson*, 148 Ohio 625, 76 N.E.2d 875 (1947) (dissent).

tion by the court is one of form rather than one of substance.²¹⁵ The court, in a well written opinion, held that public policy demanded adoption of the first view that "[A]n agreement to agree simply does not fix an enforceable obligation."²¹⁶

In *Chaney v. Noland*,²¹⁷ the court considered the requirements for making a memorandum sufficient to take the case outside the Statute of Frauds. The court applied the existing rule that a written contract or memorandum for the sale of land must itself furnish the means of identifying the subject matter in order to satisfy the Statute of Frauds. The court held that the memorandum was insufficient where it described the real estate as "54 acres of the Nolands farm."

Another question presented was whether an undelivered deed will satisfy the Statute of Frauds as a memorandum of the contract of sale. The general rule seems to be that an oral contract will not be taken out of the Statute of Frauds by an undelivered deed,²¹⁸ however there is authority to the contrary.²¹⁹ Even though the court said the memorandum was insufficient, it still lets the case turn on the proposition that the undelivered deed did not take the oral contract out of the statute which made it unnecessary to deal with the deed's insufficiency.

In *Robert Simmons Constr. Co. v. Powers Regulator Co.*,²²⁰ the basic question presented was whether a corporate surety was released from liability to a claimant by reason of the claimant granting an extension of time to the contractor. The court held that the surety is not released wherein the extension is bona fide and not in excess of reasonable, usual, or customary credit.

The court stated that the surety would not be released unless it could show that such extension had damaged his position and then only to the extent that he is harmed by the extension.²²¹

²¹⁵ See *Rainwater v. Hobeika*, 208 S.C. 433, 38 S.E.2d 495, 498 (1946), wherein the court stated "it is quite true that it is not the function of the court to make contracts between parties, but it is the court's duty so to construe their written agreements as to effectuate the intention, to the end that justice may be done." See also, *Hall v. Weatherford*, 32 Ariz. 370, 259 P. 282 (1927); *Holiday v. Pegram*, 101 S.C. 378, 85 S.E. 908 (1915).

²¹⁶ 382 S.W.2d at 201.

²¹⁷ 387 S.W.2d 308 (Ky. 1964).

²¹⁸ Annot., 100 A.L.R. 196 (1936); See also, 49 Am. Jur. *Statute of Frauds* § 694 (1943).

²¹⁹ *Peoples Trust v. Consumers Ice & Coal Co.*, 283 Pa. 76, 128 A. 723 (1925); *Chiles v. Bowyer* 127 Va. 299, 103 S.E. 619 (1920).

²²⁰ 390 S.W.2d 901 (Ky. 1965).

²²¹ *Restatement, Security* § 129 (1941). See also, *United States Fid. & Guar. Co. v. United States*, 191 U.S. 416 (1903); *Maryland Cas. Co. v. Ohio River Gravel Co.*, 20 F.2d 514 (4th Cir. 1927).

In *Motley v. Vincent*,²²² the court held that the preponderance of the evidence favored the building materials dealer who sued to recover for materials furnished defendant for the construction of houses, and that the findings and judgment of the trial court would not be disturbed.

The court decided two cases involving the proper measure of damages for breach of contract, *Ellis v. Knight*,²²³ and *Commonwealth, Dep't of Fin. v. Miller Constr. Co.*²²⁴

In the *Miller* case, the court adopted the majority rule that, where there are defects and omissions in the builder's performance, the cost of remedying such may be deducted from the contract price.²²⁵ This rule however is limited to "reasonable" expense to correct the building, *i.e.* the expense should not exceed the difference between market value with the defect and the market value without it.

In the *Ellis* case, the contractor made only partial performance. The opinion stated that it had been proper for the lower court to include in an instruction on damages the amount of completed work and the profit on the contract.²²⁶

*United Pac. Ins. Co. v. Collins*²²⁷ involved the question of whether a contract clause providing that the work would be completed within six months, with indemnity for any loss resulting in the failure to do so, resulted in automatic termination. The court held that the clause was merely providing for an appropriate time of completion and was not a condition of performance.

The court determined, in *Cardwell v. Nashville Coal Inc.*,²²⁸ that a term in a coal lease as to the "blocks of coal" was ambiguous and and oral evidence should have been admitted to prove its intent and purpose.²²⁹

In *Homan v. Lusk*,²³⁰ the court determined that from the evidence presented an oral contract had been made and the trial court's finding of no such agreement was erroneous.

*Krauss Wills Co. v. Publishers Printing Co.*²³¹ reaffirmed the

²²² 388 S.W.2d 580 (Ky. 1965).

²²³ 382 S.W.2d 391 (Ky. 1964).

²²⁴ 385 S.W.2d 211 (Ky. 1964).

²²⁵ *Mikkelsen v. Fischer*, 347 S.W.2d 527 (Ky. 1961); Restatement, Contracts § 346 (1)(a) (1st Ed. 1932); Annot., 76 A.L.R.2d 810 (1961).

²²⁶ *Johnson v. Jackitt*, 173 Ky. 406, 191 S.W. 117 (1917); *Standard Constr. Co. v. Jernesse*, 140 Ky. 833, 131 S.W. 1028 (1910); *Western v. Sharp*, 53 Ky. (14 B. Mon.) 144 (1853).

²²⁷ 389 S.W.2d 242 (Ky. 1965).

²²⁸ 384 S.W.2d 330 (Ky. 1964).

²²⁹ See also, *Blevins v. Riedling*, 289 Ky. 335, S.W.2d 646 (1942).

²³⁰ 386 S.W.2d 476 (Ky. 1964).

²³¹ 390 S.W.2d 132 (Ky. 1965).

existing law that detailed proof is necessary for any action of a conspiracy to interfere with an employment contract.²³²

In *Carter v. Howerton*,²³³ the court allowed an offset by the amount of timber left on the land where the seller of the timber had locked out the purchaser claiming a breach of contract.

²³² Massachusetts Bonding & Ins. Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960). See also, Withers v. Berea College, 349 S.W.2d 357 (1961).

²³³ 389 S.W.2d 922 (Ky. 1965).

VI. CRIMINAL LAW

A. PRETRIAL

1. Indictment-Habitual Criminal Statute²³⁴

The defendant in *Ross v. Commonwealth*²³⁵ had been convicted of a felony in 1950, 1957, and 1960. The indictment did not charge the crimes were committed in proper sequence. It is commission of a second felony after the conviction of a first felony, and commission of a third felony after conviction of second that is required to be established in order to apply the Habitual Criminal Act. This holding is in accord with prior decisions: *Coleman v. Commonwealth*.²³⁶

B. VENUE

In *Taylor v. Commonwealth*²³⁷ the court held that under KRS 452.650²³⁸ the failure to make a timely motion is deemed a waiver of venue. The court in applying the statute pointed out that defendant not only failed to make a timely motion, he did not raise the issue at any time in the trial court.

The defendant in *Marcum v. Bradley*²³⁹ was indicted for murder in Fayette County for an alleged shooting, in Jackson County, of a man who died in Fayette County. Jackson County had not returned an indictment prior to that returned in Fayette County, even though their warrant was first issued. The defendant raised a point as to the intent of KRS 452.630 which provides: "Where the venue of a prosecution is in two or more counties, the presentation shall proceed in the county in which the process for the arrest of the defendant is first issued, unless an indictment for the offense is pending in another county." The court interpreted the statute as meaning that the first process county has exclusive venue only so long as the prosecution proceeds in due course in that county. In the event that prosecution ceases before reaching the jeopardy stage the right of exclusive venue ceases. This case reaffirmed existing state and federal law.²⁴⁰

C. RIGHT TO SPEEDY TRIAL

In *Ruip v. Knight*,²⁴¹ the appellant, an inmate of a United States penitentiary, asked that he be brought to immediate trial upon an

²³⁴ KRS 431.190 (1963).

²³⁵ 384 S.W.2d 324 (Ky. 1964).

²³⁶ 276 Ky. 802, 125 S.W.2d 728 (1939).

²³⁷ 386 S.W.2d 716 (Ky. 1965).

²³⁸ KRS 452.650.

²³⁹ 385 S.W.2d 165 (Ky. 1964).

²⁴⁰ *Carroll v. Commonwealth*, 294 S.W.2d 938 (Ky. 1956); see cases collected 30 A.L.R.2d 1287, § 17.

²⁴¹ 385 S.W.2d 170 (Ky. 1964).

indictment on a charge of armed robbery. The court after considering both federal and state authorities²⁴² held: "That since the appellant has never been served with process and has never submitted himself to the jurisdiction of the court in which he seeks a speedy trial, neither his federal nor state constitutional right to a speedy trial has been violated."

In *Barker v. Commonwealth*²⁴³ the court stated that there were four factors relevant to consideration of whether denial of a speedy trial assumes due process proportions: (1) The length of the delay; (2) the prejudice to the defendant; (3) the reason for the delay; (4) waiver by the defendant. After determining the existence of a valid reason for the delay, the court stated that defendant's failure to demand a speedy trial constituted a waiver of that right.

A similar result was reached in *Walton v. Bradley*²⁴⁴ where the court held: "A delay of one term of court was not unreasonable and that appellant's failure to demand a speedy trial constituted a waiver." The reasoning behind the demand doctrine is that the right is only for a defendant's protection and is waived if not requested. There is a question whether this reasoning is fundamentally sound. If defendant has the right to a speedy trial, does not the state have a corresponding duty to hold a prompt trial, since it is within its power to do so? Should lack of legal advice be a sufficient excuse to presume waiver of a fundamental guaranty? These are questions that can be answered only by the courts through the effective assistance of the adversary system.

D. AFTER ARRAIGNMENT—JURY VERDICT

1. Procedure

A better understanding of the review of the cases necessitates categorizing the procedure cases into two areas: (1) The trial judge's action prior to trial; (2) The trial judge's conduct during the trial.

(a) *Prior to Trial*

In *Marcum v. Commonwealth*,²⁴⁵ the court held that where the defendant's driver's license was revoked because he was convicted of driving while intoxicated, where he was later arrested and convicted for operating a motor vehicle without a license and less than a week later was again arrested for operating an automobile without license and while drunk, and where the punishment was made more severe by

²⁴² Petition of Yager, 138 F. Supp. 717 (D.C. Ky. 1956).

²⁴³ 385 S.W.2d 671 (Ky. 1964).

²⁴⁴ 386 S.W.2d 457 (Ky. 1965).

²⁴⁵ 390 S.W.2d 884, 886 (Ky. 1965).

statute in case of prior offense, the charges were properly tried together. During discussion of the case, the court focused on two considerations: First was whether the evidence of the separate crimes was admissible for each of the crimes? The second consideration was time, and in *Marcum* this consideration was satisfied because the offenses were closely associated in time.²⁴⁶

The court in *Underwood v. Commonwealth*²⁴⁷ refused to grant separate trials to the wife of the defendant on the ground that the mere fact that the evidence was competent as to one of the defendants, but incompetent as to co-defendant is not alone sufficient to establish prejudice requiring granting of separate trials, for there must be some additional factors, such as antagonistic defenses, evidence as to one defendant tending directly to incriminate co-defendant, or admissions of one defendant directly implicating the co-defendant.²⁴⁸

The court in *Hopkins v. Commonwealth*²⁴⁹ held that the defendant was not prejudiced by the trial court's refusal to grant him a continuance where the same counsel, who previously had moved successfully for a continuance, alleged as a ground for the present motion that he was not ready to try the case in that he expected the defendant would be tried first on a different indictment returned some time earlier even though set for trial on the same date. The court relied on the fact in the case that the attorney had earlier signed the papers for the defendant which had set trial on the same date for both indictments. The appellant's contention was that even though the counsel signed the papers, he was not acting as counsel at the time. Definitely, the trial court did not abuse its discretion in refusing to grant the continuance and the Court of Appeals had no alternative but to affirm.

(b) *Judge's Conduct During Trial*

During the trial of the appellant in *Stephens v. Commonwealth*,²⁵⁰ the trial judge reminded the witness, the mother of the appellant, that she was under oath. On appeal, it was held that in a prosecution for the shooting, a violent event which was enacted in the presence or near presence of five witnesses, including brothers, and mother and which was thereafter covered by a pall of silence, the trial court fulfilled its obligation when it reminded the mother she was under

²⁴⁶ *Ibid.*

²⁴⁷ 390 S.W.2d 635 (Ky. 1965).

²⁴⁸ *Ibid.*

²⁴⁹ 383 S.W.2d 912 (Ky. 1965).

²⁵⁰ 382 S.W.2d 397 (Ky. 1964).

oath. In so ruling the court relied upon the trial judge's formal instruction to the jury, the violence of the event and the obvious evasiveness of the witness. Even though the trial judge did repeatedly ask questions to the witness, it did not constitute unauthorized participation in a felony trial by the judge.²⁵¹

In *Merritt v. Commonwealth*,²⁵² however, the court held that unnecessary discourse from the bench in front of the jury, announcing rulings was prejudicial to the defendant and inconsistent with the right to a fair trial. Contrary to *Stephens*, the witness was not evasive and in *Merritt* the judge argued with the counsel and commented on questions to the witnesses. For example, when counsel asked the witness to how many persons he had talked, the judge interjected, "That's silly, you can't tell how many you talked to."²⁵³ There is no question that the court had proper ground for reversal.

In *Wise v. Commonwealth*²⁵⁴ the trial court admitted testimony that the defendant had previously engaged in activities toward prosecutrix which would support a conviction of attempted "consent" rape, but the trial court failed to admonish the jury as to the limited effect of the testimony relating to the prior incident. *Held*: Reversed. Failure to admonish the jury was prejudicial error. This holding seems to be in accord with *Browning v. Commonwealth*²⁵⁵ which indicated that the error might be corrected if the jury had been instructed to the testimony's limited effect.

The trial court in *Underwood v. Commonwealth*²⁵⁶ did give an admonishment of the limited effect of evidence of prior transactions involving the appellant. The Court of Appeals held that this was sufficient even though the admonishment could have pointed out additional considerations of identity and novelty that could have been given to the evidence. Note, however, in this case the court did consider that the additional admonishment would have been more unfavorable than favorable to the defendants.²⁵⁷

In *Taylor v. Commonwealth*,²⁵⁸ the trial court promptly admonished the jury to disregard the argument of the counsel even though the defendant made no motion for discharge of the jury. This admonishment was sufficient to prevent defendant's prejudice according to the

²⁵¹ *Kinder v. Commonwealth*, 262 Ky. 840, 91 S.W.2d 530 (1936).

²⁵² 386 S.W.2d 727 (Ky. 1965).

²⁵³ *Id.* at 730.

²⁵⁴ 387 S.W.2d 292 (Ky. 1965).

²⁵⁵ 351 S.W.2d 499 (Ky. 1961).

²⁵⁶ 390 S.W.2d 635, 638 (Ky. 1965).

²⁵⁷ *Id.* at 639.

²⁵⁸ 386 S.W.2d 716, 717 (Ky. 1965).

court relying upon Kentucky Rules of Criminal Procedure [hereinafter cited as RCr] 9.24 and 9.26²⁵⁹ and *Mitchell v. Commonwealth*.²⁶⁰ A similar case was *Clements v. Commonwealth*²⁶¹ where the court held that an admonishment of court cured any substantial prejudice to defendant arising from witness' interjection of hearsay evidence.

E. EVIDENCE

The review of the evidence cases will be divided into three primary areas: (1) Admissibility; (2) Sufficiency; (3) Corroboration. Each of these broad areas will be divided into more exact topics for discussion.

The court in *Eastham v. Commonwealth*²⁶² held:

Error in production of tools referred to as burglary tools was not prejudicial to the defendant in view of uncontradicted testimony of owner and police officers that window of the store building had been pried open, that cash register had been broken into, that bag of burglary tools had been found inside of building, and that the defendant had been discovered hiding in the back of the building at about midnight.

The court evidently relied up RCr 9.26 which states:

A conviction shall be set aside on motion in the trial court or the judgment reversed on appeal, for any error or defect, when upon consideration of the *whole* case, the court is satisfied that the substantial rights of the defendant have been prejudiced.²⁶³ (Emphasis added.)

This rule supports the court's decision in *Eastham*, but it also points up the question as to whether there should be different results in this case and *Smith v. Commonwealth*.²⁶⁴ In *Smith*, the court held that in cases in which the death sentence is imposed, the court will consider any error in the record claimed to be prejudicial and upon timely motion will direct reversal, to assure a fair trial. It does not seem illogical to assume that eventually this type of reasoning would be applied to non-capital punishment cases.

The appellant in *Conley v. Commonwealth*²⁶⁵ consented to submit to a lie detector test and agreed that the test could be introduced as evidence against him on trial. The court held that this waiver which was signed by the defendant was not binding upon him. The court's reasoning was not unique for it stated that the scientific trustworthiness

²⁵⁹ RCr 9.24, 9.26 (1965).

²⁶⁰ 280 S.W.2d 189 (Ky. 1955).

²⁶¹ 384 S.W.2d 299 (Ky. 1964).

²⁶² 390 S.W.2d 136, 137 (Ky. 1965).

²⁶³ RCr 9.26(1965).

²⁶⁴ 301 Ky. 364, 192 S.W.2d 92 (1946).

²⁶⁵ 382 S.W.2d 865 (Ky. 1964).

of the lie detector test is still tenuous and the courts will not at the present recognize in an unrestricted manner the results. The court is not suggesting that there be absolute infallibility, but reiterating the holding in *Colbert v. Commonwealth*²⁶⁶ that only reasonable reliability must be established.

In *Woodford v. Commonwealth*²⁶⁷ the court held that evidence that defendant was questioned by several police officers for approximately thirty minutes at the scene of the automobile accident, did not disclose that admissions made during that time were induced by hope or fear raised by promises or threats. The court so holding interpreted KRS 422.110(1)²⁶⁸ which reads:

No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.

The reasoning of the court followed the reasoning in *Bower v. Commonwealth*²⁶⁹ and *Milam v. Commonwealth*²⁷⁰ which was that it is not necessary that a confession be made spontaneously to be voluntary, nor is a confession inadmissible merely because elicited by questions addressed to accused.

Similar reasoning was applied in *Carson v. Commonwealth*²⁷¹ where the appellant had made a written confession to the officers after his apprehension. The court held that the accused's statement was not subject to exclusion even if the appellant was not forthwith carried before the magistrate, where there is no showing that delay in presenting accused before a magistrate served as an unlawful means in coercing his statement. This decision is in accord with *Brown v. Commonwealth*.²⁷²

In *Carson v. Commonwealth*²⁷³ the prosecution introduced a photograph that showed two state troopers and two men. The appellant alleged that its admission was error because it showed him in an unfavorable pose. He secondly objected because the same photograph was used by the newspapers in giving accounts of the murder. The Commonwealth's purpose for introducing the photo was to point up

²⁶⁶ 306 S.W.2d 825 (Ky. 1957).

²⁶⁷ 388 S.W.2d 371 (Ky. 1965).

²⁶⁸ KRS 422.110.

²⁶⁹ 357 S.W.2d 333 (Ky. 1962).

²⁷⁰ 275 S.W.2d 921 (Ky. 1955).

²⁷¹ 382 S.W.2d 85 (Ky. 1964).

²⁷² 275 S.W.2d 928 (Ky. 1955).

²⁷³ 382 S.W.2d 85 (Ky. 1964).

the fact that the appellant was clad in a white shirt—thus affording corroborating testimony. The court held "that even though admission of the photograph may arouse passion or bring to mind vividly details of a shocking crime, the picture is admissible in a criminal prosecution if it illustrates a material fact or condition."²⁷⁴

In *Marcum v. Commonwealth*²⁷⁵ the court reiterated the proposition that the best evidence rule requires the most authentic evidence which is within the party's power to produce, but in practical application the rule applies almost exclusively to documentary evidence and is concerned with the content of a written instrument. The contention of the appellant in this case was that the testimony of the assistant to the commissioner of public safety was not the best evidence of the recording of the revocation of license. The court held that since the content was not directly in issue, but only whether the act was performed or not, then the witness was competent to testify to the act performed.

E. SEARCH AND SEIZURE

1. Incidental to Arrest

In *Lane v. Commonwealth*²⁷⁶ an important qualification was placed on the long established rule that a search may be made when incidental to a lawful arrest. It was held in this case that a search may not be made incidental to an arrest for a minor traffic violation. Any evidence obtained as a result of such a search is not admissible in a criminal prosecution. The apparent basis for this decision was the belief by the court that many arrests made for such minor traffic offenses were only pretexts on which to base a search for evidence of another crime.

There is another important element in this case. Prior to this decision it was a well settled rule that only the owner of the premises to be searched could complain.²⁷⁷ However, there is strong language by the court in this case indicating that in the future anyone who is lawfully on the premises may complain of an illegal search where the "fruits" of it are being used against him.

The opinion in this case does not prevent the admission of evidence obtained where no search is necessary for its discovery. Thus, in *Clark v. Commonwealth*²⁷⁸ where illicit alcoholic beverages were observed in the floor of the car, the court held that the liquor

²⁷⁴ *Id.* at 90.

²⁷⁵ 390 S.W.2d 884, 886 (Ky. 1965).

²⁷⁶ 386 S.W.2d 743 (Ky. 1965).

²⁷⁷ *Brown v. Commonwealth*, 378 S.W.2d 608 (Ky. 1964).

²⁷⁸ 388 S.W.2d 622 (Ky. 1965).

was admissible. It was stated that where the unlawful objects are plainly visible, open, and obvious to anyone who even casually looks about, it cannot be called a search, and such evidence is admissible.

The real question in the *Clark*²⁷⁹ case was whether the police had the right to stop him in the first place. The police pulled him over because the car was setting low in the back, and it weaved a little. The court said that in the interest of safety on the highways, the police may stop a car which, pursuant to KRS 189.730(1), appears to have something wrong with it. The defendant tried to fit the case within the rule of *Commonwealth v. Robey*.²⁸⁰ However, that case held that where there has been no adjudication of the charge for which the defendant was pulled over, the evidence obtained thereby is not admissible in the trial of the second charge. Since there was no charge against Clark to start with, there was no adjudication necessary to determine the admissibility of the liquor on that charge. Therefore *Clark* did not fit within that rule.

A case which did fit within the *Robey* rule is *Stiltz v. Commonwealth*.²⁸¹ There the defendant was pulled over and charged with reckless driving. Alcoholic beverages were found in the car, and he was charged with possession of liquor in a local option territory. Since he was convicted of the latter charge while the former charge was continued, the case was reversed. It was held that while the defendant had been found guilty of the first charge, the evidence found as a result of the first charge was not admissible in a trial of the second.

The same kind of situation occurred in *Taylor v. Commonwealth*.²⁸² The defendant was charged first with a violation of the local option laws, then a search revealed a concealed deadly weapon. A conviction on the latter charge was reversed since the defendant had not first been convicted of the local option charge, and the evidence of the deadly weapon was therefore inadmissible.

2. Search Warrant

The affidavit for a search warrant was held insufficient in *Buckley v. Commonwealth*,²⁸³ and the evidence obtained through the search was held inadmissible. The affidavit stated only that the affiant had purchased "a half-pint on 9-15-63." Since it didn't state what the half-pint contained, it did not provide probable cause for the magistrate to believe that a liquor violation had taken place.

²⁷⁹ 388 S.W.2d 622 (Ky. 1965).

²⁸⁰ 337 S.W.2d 34 (Ky. 1960).

²⁸¹ 390 S.W.2d 642 (Ky. 1965).

²⁸² 386 S.W.2d 480 (Ky. 1965).

²⁸³ 383 S.W.2d 349 (Ky. 1964).

In *Conn v. Commonwealth*²⁸⁴ a search warrant was issued by the county judge pro tempore at a time when the county judge was within the county and available. Since a county judge pro tempore has no authority to issue warrants while the county judge is within the county, the warrant was held invalid by the Court of Appeals.

A search was made in *Trevathan v. Commonwealth*²⁸⁵ which was neither incidental to an arrest nor under a search warrant. The sheriff had arrested the appellant and made a futile search on the day prior to the day in question. Going back the next day, he continued his search and found a knife on the appellant's premises. The court held that all reference to the finding of the knife should be omitted. It could not be called a search incidental to an arrest, since the search was too remote in time from the arrest. Therefore a search warrant was necessary, and since the sheriff had none it was an illegal search.

G. SUFFICIENCY OF EVIDENCE

The discussion of this topic will be primarily in relation to the sufficiency of circumstantial evidence with some notice of what constitutes reasonable doubt in criminal cases.

The court in *Merritt v. Commonwealth*²⁸⁶ stated that a "reasonable doubt" is a substantial doubt, a real doubt, in that the juror must ask himself not whether a better case might have been proved, but whether after hearing the evidence, the juror himself actually doubts that the defendant is guilty. This holding is in accord with *Collins v. Commonwealth*²⁸⁷ which held that a reasonable doubt does not mean a fanciful, whimsical or capricious doubt. It seems that the definition in *Merritt* is more definite and easily understood than the vague definition in *Collins*.

The court in *Brown v. Commonwealth*²⁸⁸ held that a conviction may be had upon circumstantial evidence, but the circumstances shown must be so unequivocal and incriminating in character as to exclude every reasonable hypothesis of innocence. This holding serves as the basis for conviction upon circumstantial evidence. The following cases will be considered in two primary groups: (1) Those cases where the evidence was not sufficient to meet the standard set out in *Brown*; (2) The cases where the evidence did meet the standard.

The court in *Barrett v. Commonwealth*²⁸⁹ held that circumstantial

²⁸⁴ 387 S.W.2d 285 (Ky. 1965).

²⁸⁵ 384 S.W.2d 500 (Ky. 1964).

²⁸⁶ 357 S.W.2d 333 (Ky. 1932).

²⁸⁷ 386 S.W.2d 727, 729 (Ky. 1965).

²⁸⁸ 295 S.W.2d 797 (Ky. 1956).

²⁸⁹ 340 S.W.2d 471 (Ky. 1960).

evidence of possession was insufficient to sustain the conviction of the appellant. The prosecution only presented evidence that five one-gallon jars of moonshine whiskey were found buried 150 feet behind the appellant's house on property not owned by him. The court followed the reasoning of *Lorman v. Commonwealth*²⁹⁰ in that mere possession did not exclude every reasonable hypothesis of innocence, but was as reasonably consistent with innocence as with guilt.

The appellant in *Rose v. Commonwealth*²⁹¹ was present when her son killed his father. There was no other evidence connecting the appellant with the killing except an alleged threat and the court held that the evidence, including evidence of a threat did not sustain a conviction. This holding was in accord with *Holman v. Commonwealth*²⁹² which held that mere presence at the scene of the crime is not evidence that he committed it or aided in its commission.

In *Matney v. Commonwealth*²⁹³ the court held that evidence by witnesses that they could not see the gun prior to its use by the appellant was sufficient to sustain a conviction of carrying a concealed deadly weapon even though other witnesses testified that they saw the gun. The court was in accord with *Kelly v. Commonwealth*²⁹⁴ which had stated that it was a jury question which of the testimony to believe.

The court in *Clements v. Commonwealth*²⁹⁵ held that evidence including some corroboration of the prosecuting witness' testimony was sufficient to sustain conviction for incest. The evidence consisted mainly of testimony by the prosecutrix and her mother. Note that there is no doubt here for uncorroborated testimony of the prosecuting witness being sufficient to sustain a conviction for incest.²⁹⁶

In *Hines v. Commonwealth*,²⁹⁷ the court held that the following evidence sustained a conviction: The dwelling house involved was on a farm owned by appellant's wife and was heavily insured; appellant had driven out to get something he did not pick up; he returned to the house alone to lock up; fifteen minutes later the fire was discovered; appellant did not try to put it out or investigate.

The appellant in *Taylor v. Commonwealth*²⁹⁸ during the night of the alleged crime stated he had driven through a police roadblock

²⁹⁰ 390 S.W.2d 654 (Ky. 1965).

²⁹¹ 385 S.W.2d 202 (Ky. 1964).

²⁹² 269 S.W.2d 243 (Ky. 1954).

²⁹³ 291 Ky. 622, 165 S.W.2d 167 (1942).

²⁹⁴ 387 S.W.2d 586 (Ky. 1965).

²⁹⁵ 232 S.W.2d 1022 (Ky. 1950).

²⁹⁶ *Browning v. Commonwealth*, 351 S.W.2d 499 (Ky. 1960).

²⁹⁷ 390 S.W.2d 152 (Ky. 1965).

²⁹⁸ 386 S.W.2d 716 (Ky. 1965).

that afternoon and had registered under a fictitious name right before the robbery. When arrested, he had about 2,000 dollars on him and a knotted stocking in the car. The point here is that the appellant was not accused of participating directly in the robbery act, rather he was alleged to be the driver of the get-away car. The court held that the evidence sustained a conviction. This result of guilty is very questionable, because it is as reasonable to assume that he was telling the truth about where he got the money, the amount of which was only one-third of the total amount stolen. The case of *Hoskins v. Commonwealth*²⁹⁹ which the court relied upon was much stronger than *Taylor*, for the defendant in that case had made several false statements to a number of witnesses.

H. CORROBORATION OF TESTIMONY

To better understand the court's rulings concerning corroboration it is necessary to first be familiar with the criminal rule involved, RCr 9.62: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense."³⁰⁰

The court in *Clark v. Commonwealth*³⁰¹ defined an accomplice as one "who knowingly, voluntarily, and with common intent, unites with the principal in perpetration of crime, either by being present and joining in the criminal act, by aiding and abetting in its commission, or, if not present, by advising and encouraging performance of the act." In *Howard v. Commonwealth*³⁰² the court held that the fact of joint indictment does not establish that the defendants were accomplices so as to require corroboration of testimony of co-defendants for conviction of appellant where charge as to one defendant is dropped and each asserts full responsibility of the other. In the *Howard* case, the court also pointed out that even though the witness might be an accessory after the fact it did not make him an accomplice so as to require corroboration of his testimony for conviction.

The court in *Barker v. Commonwealth*³⁰³ held that evidence is sufficient to corroborate accomplice's testimony if it tends to connect defendant with the commission of the offense, but is not sufficient if it merely shows that the offense was committed and the circumstances thereof. In *Barker* the court stated that the statement by the appellant that "if anything has happened to those old people I know who done

²⁹⁹ 374 S.W.2d 839 (Ky. 1964).

³⁰⁰ RCr 9.62 (1965).

³⁰¹ 386 S.W.2d 458 (Ky. 1965).

³⁰² 387 S.W.2d 578 (Ky. 1965).

³⁰³ 385 S.W.2d 671 (Ky. 1964).

it" plus other incriminating circumstances was sufficient to corroborate the testimony of an accomplice. This is in accord with what the court in *Harris v. Commonwealth*³⁰⁴ stated was required, *i.e.*, that the evidence must only tend to connect some fact. The court held in *Harris*, that the rule requiring corroboration of accomplice is met if corroborated evidence is of such quality that a reasonable and unprejudiced mind could conclude that it tends to establish some fact that links the accused with the principal fact of the commission of the offense. In *Flora v. Commonwealth*³⁰⁵ the court also applied this test when they held that the testimony of a friend of the appellant connecting the appellant with the theft of tobacco together with the defendant's admission that he was in the neighborhood where the theft took place was sufficient to present a jury question as to whether there was sufficient corroboration of accomplice to sustain the conviction.

The appellant in *Hart v. Commonwealth*³⁰⁶ stated prior to trial that "he didn't know anything about breaking into the store and didn't remember anything about it." The court held that this was equivalent to remaining silent and was insufficient to corroborate testimony of convicted store-breakers and to link appellant with the break-in charge. This holding is in accord with *White v. Commonwealth*³⁰⁷ where the defendant stated, "I neither admit nor deny the charge."

I. INSTRUCTIONS

In *Harris v. Commonwealth*³⁰⁸ the defendant was charged with murder. His defense was that he was not even present. The evidence in the case consisted of one witness who testified that he saw the defendant merely walk forward, shoving his hand into the stomach of the deceased. He didn't see the knife in the defendant's hand, but it was there because the victim died. A conviction was reversed on the ground that an instruction should have been given on voluntary manslaughter.

Why was this instruction necessary? The rule is that where there is enough evidence to support a conviction for a lesser offense than murder, an instruction should be given on the lesser offense.³⁰⁹ Here the court said that the jury could reasonably infer that the striking was preceded by a verbal, and perhaps a physical, exchange. Of course, it would appear just as reasonable to infer that it was done in self de-

³⁰⁴ 285 S.W.2d 489 (Ky. 1956).

³⁰⁵ 387 S.W.2d 15 (Ky. 1964).

³⁰⁶ 389 S.W.2d 939, 940 (Ky. 1965).

³⁰⁷ 292 Ky. 416, 166 S.W.2d 873 (Ky. 1942).

³⁰⁸ 389 S.W.2d 907 (Ky. 1965).

³⁰⁹ *Suttrell v. Commonwealth*, 250 Ky. 334, 63 S.W.2d 292 (1933).

fense. This reasoning would go something like this: The jury infers that the deceased reached for a cigarette; they infer that the defendant thought he was reaching for a knife or gun; they then infer that the defendant, petrified with fear, stabbed the deceased to protect himself. Thus, there would be an acquittal on the ground of self defense. Yet, why stop with instructions on voluntary manslaughter and self defense? Why not give the jury a copy of Stanley's *Instructions* and let them choose their own, to match whatever inferences the twelve men might come up with?

In *Piper v. Commonwealth*³¹⁰ and *Koenzig v. Commonwealth*,³¹¹ the court reaffirmed the rule that objections must be made at the time the instructions are given or in a motion for new trial. The appellant in *Stewart v. Commonwealth*³¹² did not object at the time the instructions were given, but in his motion and grounds for new trial he stated "the court erred in its instructions." The Court of Appeals found this statement insufficient to appraise the trial court of the nature of the alleged error.

In *Ramsey v. Commonwealth*,³¹³ the instructions were timely objected to. In reversing the case, the court condemned an instruction which required the jury to believe appellant's testimony beyond a reasonable doubt in order to find him not guilty. The lower court in *Shanks v. Commonwealth*,³¹⁴ gave an instruction on murder, voluntary manslaughter and self defense. Appellant argued that involuntary manslaughter should have been included since his stabbing of the victim could have been unintentional. The Court of Appeals stated that an involuntary manslaughter instruction is warranted when the killing is unintentional and when the facts exclude the inference of an intentional killing. The use of a knife, a deadly weapon, to defend one's self in a brawl does not warrant an instruction on involuntary manslaughter because an intentional killing is inferred from the facts. The court concluded by stating another reason for not reversing, that the five-year penalty fixed by the jury for voluntary manslaughter was within the range permitted for involuntary manslaughter.

J. CONSTITUTIONAL INTERPRETATION

A. Interpretation Of Section 43 Of The Kentucky Constitution³¹⁵

The members of the General Assembly shall in all cases except treason, felony, breach of surety of the peace, be privileged from arrest during

³¹⁰ 387 S.W.2d 13 (Ky. 1965).

³¹¹ 390 S.W.2d 648 (Ky. 1965).

³¹² 389 S.W.2d 910 (Ky. 1965).

³¹³ 383 S.W.2d 134 (Ky. 1964).

³¹⁴ 391 S.W.2d 888 (Ky. 1965).

³¹⁵ Ky. Const. § 43.

their attendance on the sessions of their respective Houses and in going to and returning from the same; and for any speech or in debate in either House they shall not be questioned in any other place.

The court in *Swope v. Commonwealth*³¹⁶ had occasion to interpret this provision for the first time. The court after interpreting the legislative history of the privilege and upon examination of English history, held: "Exception of cases of treason, felony, breach of surety of the peace from the parliamentary privileged from arrest enjoyed under the constitution excluded all crimes from the operation of the privilege, so that the appellant could be found guilty of breach of peace."³¹⁷

Upon reviewing the facts, there is some doubt as to whether this case was appropriate for such consideration. The appellant Swope was arrested at a ball game for disturbance of the peace. He was not going and coming from the General Assembly which seems to be required by the statute. No decision was found that interpreted "going and coming" as applied to this statute; but, considering what is believed to be the purpose of the privilege, it is difficult to see how it would apply in a case where the appellant was in no way concerned with the General Assembly at the time.

K. DOUBLE JEOPARDY

In *Rice v. Commonwealth*³¹⁸ the court held that a defendant may not complain of double jeopardy when he procured the setting aside of the former judgment. Appellant had been granted a writ of habeas corpus and was convicted under the same indictment on which the former conviction was based. He alleges that the subsequent trial should be reversed on grounds of double jeopardy. The Court of Appeals, which had granted the writ, stated that although it was not expressly made a part, the granting was made pursuant to KRS 419.120,³¹⁹ which contemplates a new trial. The court reasoned that since the judgment of the lower court had been set aside by the voluntary proceedings of the appellant, the next step must be that of a new trial. The parties were then in the same position as if there had been no trial.

*Lindsey v. Commonwealth*³²⁰ established the proposition that re-

³¹⁶ 385 S.W.2d 57 (Ky. 1964).

³¹⁷ *Id.* at 58.

³¹⁸ 387 S.W.2d 4 (Ky. 1965).

³¹⁹ KRS 419.120—Removal of Person to Another Court.

If the evidence at the hearing shows probable cause that the detained person is guilty of an offense that is within the exclusive jurisdiction of another court, or that was committed in another county, the court shall order that he be taken immediately before the court having jurisdiction or remand him to the custody of an officer to be taken to the proper county for new proceedings against him.

³²⁰ 383 S.W.2d 333 (Ky. 1964).

ceiving stolen goods is an offense separate and distinct from that of stealing the same property; therefore, a dismissal on the merits of one would not be a bar to a conviction on the other. In an unusual display of strategem the defendant, in his trial on a charge of knowingly receiving stolen goods, testified that he had stolen the goods. He had hoped that the two crimes were so interrelated that they would be controlled by the test, "part of the same criminal act, transaction, or omission," set forth in *Arnett v. Commonwealth*.³²¹ This test, if applicable, would have prevented the subsequent indictment on the grounds of former jeopardy. The court upheld the state's action of dismissing the first indictment and re-indicting and convicting defendant on two counts of felonious theft of the same property. The court reasoned that since appellant had sold stolen hogs, he had either stolen them himself or had received them from someone else. He could not have done both. The court considers these offenses as mutually exclusive, but is it not possible that one who received could also conceive, plan, and aid the perpetrators to such a degree that their acts are imputed to him? In a case such as that, one could be guilty of both crimes.

L. ENTRAPMENT

In *Gordon v. Commonwealth*³²² the court held that where the crime was conceived, planned, and perpetrated by appellant, the fact that the public authorities provided an opportunity did not constitute an entrapment. The court reasoned that the criminality of the act depends on whether the criminal intent originated in the minds of the accused or his entrappers, and where it originates in the accused, the fact that the opportunity is furnished does not constitute a defense.

M. POST-CONVICTION REMEDIES

1. Probation and Parole

In *Adams v. Ferguson*,³²³ the court held that "parole is a matter of legislative grace." Where the prisoner had been committed under a twenty-one year sentence and later had two-year and seven-year convictions, and where he had been paroled a number of times between the three convictions, the parole board did not abuse its discretion in refusing to parole. This is in accord with *Willard v. Ferguson*.³²⁴

In *Gossett v. Commonwealth*,³²⁵ the lower court ordered that ap-

³²¹ 270 Ky. 335, 109 S.W.2d 795 (1937).

³²² 387 S.W.2d 13 (Ky. 1965).

³²³ 386 S.W.2d 462 (Ky. 1965).

³²⁴ 358 S.W.2d 516 (Ky. 1962).

³²⁵ 384 S.W.2d 308 (Ky. 1964).

pellant's motion and grounds for new trial be sustained and his indictment for false swearing be dismissed provided that he absent himself from the county and obey the law for one year. The Court of Appeals construed this order as being a postponement of judgment. This in effect made it a one year probation under KRS 439.260. This statute permits the circuit court to postpone the entering of a judgment and the imposing of a sentence and to place the defendant on probation. Since the terms of the probation had not been broken the lower court could not impose the original sentence.

2. RCr 11.42.

(a) *Scope*: A major portion of the petitions brought under RCr 11.42 have been brought under a misapprehension of the purpose and nature of the remedy offered by the rule.³²⁶ An overwhelming majority of these cases were brought by prisoners filing their briefs pro se. It is interesting to note that of all the motions brought under RCr 11.42 during the last term, this writer has not found a single case wherein the petitioner succeeded in having his judgment of conviction vacated.³²⁷

Many of the cases involved various allegations of errors committed at the trial. However, RCr 11.42 does not authorize relief from a judgment of conviction for errors committed at the trial, unless it is shown that there was a violation of a constitutional right, a lack of jurisdiction, or such violation of a statute as to make the judgment void and thereby subject to collateral attack.³²⁸

In *Lee v. Commonwealth*³²⁹ it was held that alleged errors committed in the trial court must be a violation of due process, before they are appropriate bases for relief under RCr 11.42.

Even if the grounds alleged for the motion are not errors at the trial, the allegations must still be such that if true, the judgment would be void.³³⁰ Otherwise, the petitioner is not even entitled to a hearing on his allegations. Apparently, however, word has not reached the prison lawyers of the rule of stare decisis. They continue to allege grounds which, even if true, would not invalidate the judgments.

In *Collier v. Commonwealth*³³¹ it was alleged that evidence was admitted which was obtained through an illegal search.

³²⁶ *King v. Commonwealth*, 387 S.W.2d 582 (Ky. 1965).

³²⁷ Except in *Wedding v. Commonwealth*,—S.W.2d—1965, decided in the last term but not final until the next term.

³²⁸ *Warner v. Commonwealth*, 385 S.W.2d 62 (Ky. 1964).

³²⁹ 389 S.W.2d 241 (Ky. 1965).

³³⁰ *Maye v. Commonwealth*, 386 S.W.2d 731 (Ky. 1965).

³³¹ 387 S.W.2d 858 (Ky. 1965).

In *Hicks v. Commonwealth*³³² the allegation was that the trial judge erroneously imposed the sentence in a case where death was a possible penalty.

In *Warner v. Commonwealth*³³³ the petitioner claimed insufficiency of proof of venue; that the testimony at his trial was too conflicting to understand what the evidence was; that it was error for the trial judge to inquire in the presence of the jury as to whether counsel for the defense would consent to a separation of the jury during recess; and a bare assertion that the sheriff had entered the jury room while it was considering the verdict.

In *Maye v. Commonwealth*³³⁴ the allegations made were that there was improper admission of evidence of prior convictions; failure of the court to instruct properly and in writing; insufficiency of the evidence to support the conviction and the verdict was against the law and the evidence.

In *Lee v. Commonwealth*³³⁵ it was argued, *inter alia*, that it was error not to call as the first witness the officer who obtained the warrant of arrest; that he was denied a fair trial by being tried jointly with an accomplice; and that the Commonwealth's Attorney conversed with the jury.

In *Walker v. Commonwealth*³³⁶ the claimed errors were: illegal arrest, failure to be taken before a magistrate, failure to recognize witnesses, errors in indictments, and failure to instruct properly.

In *Jones v. Commonwealth*³³⁷ the petitioner alleged a failure to endorse the names of the witnesses on the indictment.

In *Davenport v. Commonwealth*³³⁸ one of the grounds alleged was that the court didn't comply with KRS 203.340, which requires a mental examination for any person indicted as a twice convicted habitual criminal.

In *Perkins v. Commonwealth*³³⁹ the grounds alleged were that there was newly discovered evidence which was pertinent to the case.

In all of the above cases the Court of Appeals held that the petitioners were not entitled to a hearing on those allegations. Even if the alleged errors are true and would have been reversible error if

³³² 388 S.W.2d 568 (Ky. 1965).

³³³ 385 S.W.2d 62 (Ky. 1964).

³³⁴ 386 S.W.2d 731 (Ky. 1965).

³³⁵ 389 S.W.2d 241 (Ky. 1965).

³³⁶ 386 S.W.2d 452 (Ky. 1965).

³³⁷ 388 S.W.2d 601 (Ky. 1965).

³³⁸ 390 S.W.2d 662 (Ky. 1965).

³³⁹ 383 S.W.2d 916 (Ky. 1964).

raised on appeal, they aren't sufficient to invalidate a judgment. Therefore, no hearing is required.

Where the allegations may be controverted by looking at the record, no hearing is required either.³⁴⁰ Further, where the alleged errors are of previous convictions the petitioner is not entitled to a hearing. In *Sipple v. Commonwealth*,³⁴¹ it was held that RCr 11.42 does not provide, expressly or by implication, for the review of any judgment other than the one pursuant to which the movant is being held in custody.

Mere allegations of errors are not sufficient, either.³⁴² There must be facts shown which support the claims.

(b) *Right to Counsel*

Where the petitioner's allegation is such that if true it would invalidate the proceeding, he is entitled to a hearing and, if a pauper, to the appointment of counsel for the hearing. This is true no matter how unfounded the claim may be, and even though the court knows it is untrue.³⁴³ The movant should state in his petition that he is financially unable to employ counsel. However, if he doesn't so allege and appears at his hearing without counsel, the court should conduct a sufficient preliminary hearing to determine if he is able to secure counsel. The court should then make a finding of fact determining the question. In *Coles v. Commonwealth*,³⁴⁴ no such finding of fact was made, so the Court of Appeals could not determine whether the movant was entitled to have counsel at his hearing. The court said that it was probable that the movant was a pauper at the time of the hearing and thus entitled to the appointment of counsel for both the hearing and the appeal therefrom.

Of course, where the movant is not entitled to a hearing because of the nature of his allegations, neither is he entitled to the appointment of counsel. This is true, even if he desires to appeal from the order denying his petition without a hearing.³⁴⁵

The majority of cases brought under RCr 11.42 during the last term contained allegations of either no counsel at all at the trial, or that the counsel was ineffective.

As everyone knows, the right to counsel is absolute.³⁴⁶ This is true even if the defendant pleads guilty at his trial.³⁴⁷ However, it can

³⁴⁰ *King v. Commonwealth*, 387 S.W.2d 582 (Ky. 1965).

³⁴¹ 384 S.W.2d 332 (Ky. 1964).

³⁴² *Coles v. Commonwealth*, 386 S.W.2d 465 (Ky. 1965).

³⁴³ *Ibid.*

³⁴⁴ 386 S.W.2d 465 (Ky. 1965).

³⁴⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁴⁶ *Sipple v. Commonwealth*, 384 S.W.2d 332 (Ky. 1964).

³⁴⁷ *Davenport v. Commonwealth*, 390 S.W.2d 662 (Ky. 1965).

be waived if the waiver is made "intelligently, competently, understandingly, and voluntarily."³⁴⁸ In *Davenport v. Commonwealth*,³⁴⁹ petitioner was held to have waived counsel. When the trial court asked him if he wanted counsel, he replied that he did not. He had had enough experience from former trials to know what he was doing when he refused counsel, and his refusal was therefore a waiver.

In *Yates v. Commonwealth*,³⁵⁰ the movant did not have counsel at his examining trial before the police court judge. This was held not to be a deprivation of due process in the absence of a showing that anything prejudicial to the movant occurred because of his lack of counsel at such stage.

If the court does appoint counsel to represent the defendant, the defendant may try to show that the counsel was inadequate. However, there must be facts shown to substantiate the claim before a hearing is required.

In *Jones v. Commonwealth*,³⁵² the defendant argued that court-appointed counsel had refused to defend him unless he pleaded guilty, and had pointed out the lack of pay. He also argued that his plea of guilty was made under duress. The Court of Appeals reversed a denial of a hearing, saying that the petitioner was entitled to a hearing on these allegations. However, in *Lawson v. Commonwealth*,³⁵³ the petitioner argued inadequate counsel to no avail. He had pleaded guilty, received a minimum sentence, and did not argue that his plea was coerced.

In *Curry v. Commonwealth*,³⁵⁴ it was held that the grounds alleged by the petitioner had prima facie substance and thus he deserved a hearing. He alleged that his court-appointed counsel had refused to appeal or to move for a new trial.

In *Yates v. Commonwealth*,³⁵⁵ the petitioner alleged ineffective assistance of court-appointed counsel, and was given a hearing by the lower court. His only ground was that the attorney failed to consult him until the day of the trial. Here it was held that where all the testimony at the hearing was to the effect that the counsel for defendant had made a strong and vigorous defense, the judgment could not be vacated.

In *Uwaniwich v. Commonwealth*,³⁵⁶ the mere allegation that the

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ 386 S.W.2d 450 (Ky. 1964).

³⁵² 389 S.W.2d 927 (Ky. 1965).

³⁵³ 386 S.W.2d 734 (Ky. 1965).

³⁵⁴ 390 S.W.2d 891 (Ky. 1965).

³⁵⁵ 386 S.W.2d 450 (Ky. 1964).

³⁵⁶ 390 S.W.2d 658 (Ky. 1965).

defendant was arraigned, tried and convicted on the same day does not show that court-appointed counsel was inadequate. In the absence of a motion for a continuance, the court presumed that counsel did not think one was needed. The mere failure to ask for a continuance is not sufficient to show inadequate counsel.³⁵⁷

In *Maye v. Commonwealth*,³⁵⁸ warning was given to trial courts to be cautious in appointing an attorney for one defendant who is representing the co-defendant. There is a possibility of conflicting interests between the two, and only separate counsel could protect each from possible advantage of the other. However, in *Lee v. Commonwealth*,³⁵⁹ decided one month after the *Maye* case, the appointment of the same attorney for both co-defendants was held not sufficient to show a denial of a fair trial.

The counsel in the foregoing cases were court-appointed. Would it make any difference if the attorney is chosen by the defendant instead of being court-appointed?

This question was answered in *King v. Commonwealth*.³⁶⁰ It was held that the petitioner was estopped to complain of ineffective assistance of counsel, since it was not court-appointed. The decision was based on a federal case³⁶¹ which discussed the problem thoroughly. It was pointed out that there is a vast difference between lacking the effective assistance of counsel and being denied the right to have the effective assistance of counsel. It is the latter only for which the state is responsible. The state cannot be charged with the errors of counsel who is chosen by the defendant.

However, the court didn't seem so adamant in *Whack v. Commonwealth*.³⁶² Here the court said only that the defendant *ordinarily* waives the right to complain of his chosen attorney. Then in *Bivens v. Commonwealth*,³⁶³ decided the same day, the court did not mention waiver or estoppel. The defendant had counsel of his own choosing and complained of inadequate assistance. It was argued that his counsel didn't know that the defendant had been in a mental institution a few years before the trial. The court treated the case on its merits and concluded that these circumstances were not such as to shock the conscience of the court.

It is suggested that this case was not meant to change the rule of waiver, discussed above. The court probably thought the novel

³⁵⁷ *Jones v. Commonwealth*, 388 S.W.2d 601 (Ky. 1965).

³⁵⁸ 386 S.W.2d 731 (Ky. 1965).

³⁵⁹ 389 S.W.2d 241 (Ky. 1965).

³⁶⁰ 387 S.W.2d 582 (Ky. 1965).

³⁶¹ *United States v. Handy*, 203 F.2d 407 (3d Cir. 1953).

³⁶² 390 S.W.2d 161 (Ky. 1965).

³⁶³ 390 S.W.2d 149 (Ky. 1965).

circumstances deserved some comment, since the decision was going to be the same either way. This is similar to the situation in *Collier v. Commonwealth*³⁶⁴ where the court could have dismissed the appeal because it was not timely. However, citing a Supreme Court case,³⁶⁵ the court merely declined to do so. The case was then treated on its merits and decided against the petitioner, anyway. The claim in the case concerned illegally seized evidence, and the court undoubtedly thought it warranted discussion. It is suggested that if either of these cases had valid grounds for a reversal, the technical ground would have prevailed and the cases would still be affirmed.

See the discussion of *Hobbs v. Stivers*,³⁶⁶ under "Mandamus," and *Langdon v. Thomas*,³⁶⁷ under "Habeas Corpus."

3. Habeas Corpus

In *Langdon v. Thomas*³⁶⁸ the court again showed itself to be master of the unorthodox, by declining to dismiss on a technical ground. However, here there was a perfectly valid reason, and it was stated in the opinion. This was a petition for a writ of habeas corpus. It should have been brought under RCr 11.42, and the lower court dismissed it on that ground. This was consistent with the many cases decided in the prior term of the Court of Appeals, led by *Ayers v. Davis*.³⁶⁹ However, the Court of Appeals looked closer and saw that the grounds alleged would not be sufficient even under RCr 11.42. (The alleged ground was error in the instructions.) Therefore, in order to avoid the circuitry of dismissing the appeal; requiring petitioner to bring the same action under RCr 11.42; and then holding on an appeal of that action that the grounds were insufficient, the court merely said now what they would say later. It was held that the alleged error in the instructions was not a sufficient ground for relief either under habeas corpus, or RCr 11.42. It is suggested that this same reasoning would apply to the situation in *Collier v. Commonwealth*.³⁷⁰ There, if the appeal were dismissed because it was not timely, the petitioner would simply make another motion under RCr 11.42 on the same ground and then make a timely appeal. Thus, the question of illegally seized evidence would ultimately be before the Court of Appeals anyway. (On the question whether a second motion

³⁶⁴ 387 S.W.2d 858 (Ky. 1965).

³⁶⁵ 378 U.S. 139 (1964).

³⁶⁶ 385 S.W.2d 76 (Ky. 1964).

³⁶⁷ 384 S.W.2d 508 (Ky. 1965).

³⁶⁸ *Ibid.*

³⁶⁹ 377 S.W.2d 154 (Ky. 1964).

³⁷⁰ 387 S.W.2d 858 (Ky. 1965).

under RCr 11.42 could be brought in this situation, see *Schroader v. Thomas*.³⁷¹)

Another somewhat unique situation was brought about in *Schroader v. Thomas*.³⁷² It might be said that the petitioner lost the battle but won the war. He had previously been denied a hearing under RCr 11.42, but didn't perfect his appeal. He then switched to habeas corpus, and was denied that by the lower court. The Court of Appeals affirmed the dismissal of the habeas corpus petition but remanded the record to the circuit court. They directed that it be treated as a motion to vacate the judgment under RCr 11.42, and that the petitioner be given a full-dress hearing, complete with counsel. You might say that the Court of Appeals is trying its best to be fair to the prison lawyers of Eddyville and ignoring those technicalities with which regular attorneys are faced.

In *Baker v. Davis*³⁷³ the technicalities were not overlooked, even though it was a petition for a writ of habeas corpus by a prisoner. This petition was dismissed because a prior petition by the same party on the same ground had previously been decided against him on the merits, and he had the benefit of appellate review of the prior decision. The court could have granted a hearing, since this situation is within its discretion. However, it decided not to since the "ends of justice would not be served" by doing so. (Here the ground alleged was that Kentucky had forfeited its jurisdiction to reconfine him on a parole violation, since prior to the reconfinement he was released to federal authorities for trial and sentence on a federal charge. This ground was treated on the merits in *Baker v. Commonwealth*.³⁷⁴)

4. Mandamus

In *Hobbs v. Stivers*³⁷⁵ the petitioner asked for a writ of mandamus directing the circuit court to rule on his motion to vacate judgment. The Court of Appeals said that ordinarily mandamus would lie, but here the petition showed on its face that ultimately the "relief sought would prove fruitless." Therefore, in order to obviate the useless circuity of forcing the petitioner to appeal again to get the message, the court merely denied the mandamus.

In *Wilson v. Jefferson Circuit Court*³⁷⁶ a copy of the petitioner's motion to vacate the judgment under RCr 11.42 was not included in

³⁷¹ 387 S.W.2d 312 (Ky. 1965).

³⁷² *Ibid.*

³⁷³ 383 S.W.2d 125 (Ky. 1964).

³⁷⁴ 378 S.W.2d 616 (Ky. 1965).

³⁷⁵ 385 S.W.2d 76 (Ky. 1964).

³⁷⁶ 384 S.W.2d 305 (Ky. 1964).

the mandamus proceeding to compel the circuit court to grant a hearing. The court decided to overlook that fact, since the petitioner was without counsel. However, without the motion the court couldn't say whether he was entitled to a hearing or not. Therefore, the writ was granted to the extent that the lower court was directed to grant a hearing if a valid claim was stated, and to deny a hearing if the motion showed on its face that it was invalid. Since the circuit court had already denied a hearing, and the law is well settled on when, and when not, to grant a hearing, it seems peculiar for the Court of Appeals to direct the circuit court to go through the motions again. It appears that judicial notice was here taken that the circuit court did not consider the law when it first denied the hearing.

Of course, where the circuit court has not ruled on a motion, mandamus will lie to compel a ruling.³⁷⁷ Since some circuit courts have been neglecting to notify the petitioners of their order, the time for appeal does not begin to run until the petitioner has received a copy of the circuit court's order.³⁷⁸

Mandamus will also lie to compel the circuit court to furnish the petitioner with the record of the proceedings in order to perfect his appeal.³⁷⁹ His time for appeal doesn't begin to run until he has received a copy of the record.

A petitioner is not entitled to a record where he is not appealing from something at that time. Thus in *Bauer v. Pound*³⁸⁰ the petitioner was denied a copy of the record of his original trial, where he was not seeking judicial review. The grounds for asking for the record were that it was needed "to substantiate" certain claims the petitioner must make in seeking legal redress. The Court of Appeals called it a "fishing expedition" in denying it. In *Moore v. Ropke*³⁸¹ the same type of request was called a "sort of game which is beginning to try the patience of the court." It was said that the only time an indigent is entitled to a copy of the record is when he is then taking an appeal. Thus, he is not entitled to a copy of the record of a former conviction until after he has had a hearing on his collateral attack.³⁸²

*Schumaker v. Wright*³⁸³ was a mandamus proceeding challenging the trial court's authority to make a sentence run consecutively with a prior judgment entered by another court within the state. The court

³⁷⁷ Helton v. Stivers, 385 S.W.2d 172 (Ky. 1964).

³⁷⁸ Kraus v. Ropke, 385 S.W.2d 162 (Ky. 1964).

³⁷⁹ Davenport v. Winn, 385 S.W.2d 185 (Ky. 1964).

³⁸⁰ 385 S.W.2d 167 (Ky. 1964).

³⁸¹ 385 S.W.2d 161 (Ky. 1964).

³⁸² Allen v. Wolfenbarger, 385 S.W.2d 160 (Ky. 1964).

³⁸³ 390 S.W.2d 887 (Ky. 1965).

held that RCr 11.01 doesn't limit itself to judgments rendered by the same court at the same time. Therefore the relief sought was denied.

*Dublin v. Osborne*³⁸⁴ was a mandamus proceeding challenging the trial court's authority to amend a judgment eight months after it was entered. The amending order made the judgment run consecutively with a prior judgment, rather than concurrently as the judgment originally stated. It was held that the amending order was void since it was not made with approval of the Court of Appeals. Also, since it had such a substantial effect on the rights of the defendant, it was held to be an unreasonable delay. The defendant had already been released from jail on the first sentence when the amending order on the second judgment was made. This had the effect, then, of placing the defendant back in jail. This did not seem quite fair to the court.

³⁸⁴ 388 S.W.2d 588 (Ky. 1965).

VII. DOMESTIC RELATIONS

During the past year the Court of Appeals decided twenty-four cases in the field of domestic relations, but of these, only fifteen merit attention. Concerning the question of emancipation of a minor child, the court in *Carricato v. Carricato*³⁸⁵ said that the intention of the father actually controls as to an express emancipation. In this case, the father, mother and minor daughter all testified that the daughter was in fact emancipated; owned and paid for her car; was independent and had been working since high school; asked no consent from her parents for anything she did; had a bank account; took trips without asking permission and did other acts indicative of complete independence, except that she continued to live at home and took her meals there. The court, in holding that the daughter, age twenty years and ten months, was emancipated, said that nowhere does any opinion require that the minor child leave home and not eat there. In so holding the court distinguished *Thompson v. Thompson*³⁸⁶ since there the only witness testifying was the mother who sought the damages and, because she was an interested witness, her testimony did not have to be believed. The *Carricato* case is important not because of any major revisions it produces in the law, but in the requirements it sets forth as to what the Court of Appeals considers necessary to prove the fact of emancipation.

In the area of child custody, the court decided two cases that should be discussed. In *Schwartz v. Schwartz*³⁸⁷ the court held that if a child is found to be a qualified witness in an action for divorce or for modification of custody or visitation provisions of a divorce decree, his testimony should be given in the presence of the parties or their counsel, and if testimony of the children is to be used as a basis for the chancellor's decision, it should be reported so that it might be preserved for appellate review. In so holding the court expanded those requirements that it had set in *York v. York*,³⁸⁸ that the testimony of the children should be in the presence of the parties or their counsel. It may be assumed that in any case where there is a possibility that the chancellor might use the testimony of the children in his decision such testimony must be reported, in order to preserve it for appellate review.

In *Nicol v. Conlan*,³⁸⁹ another custody battle, the court said that where the father has custody, and the welfare of children is shown

³⁸⁵ 384 S.W.2d 85 (Ky. 1964).

³⁸⁶ 264 S.W.2d 667 (Ky. 1954).

³⁸⁷ 382 S.W.2d 851 (Ky. 1964).

³⁸⁸ 280 S.W.2d 553 (Ky. 1955).

³⁸⁹ 385 S.W.2d 779 (Ky. 1964).

to be well served, the chancellor may allow the father to retain custody rather than risk that their welfare will be equally well served in the custody of the mother. In this case the fitness of the parents was not in issue, and the court said that since children of ten and twelve years are not of "tender years" within the meaning of that term, that the fitness or unfitness of the mother was not determinative. The court based its decision on what would serve the best interests of the children, and said that it would not be in their best interest to chance that their welfare would be equally well served in a different environment.

In the case of *Richey v. Richey*³⁹⁰ the court had before it the question whether the trial court had the power to adjust the amount of periodic alimony payments agreed upon in a property settlement agreement which was incorporated into the judgment divorcing the parties. The court found that the agreement was intended by the parties to be final, and was in fact an adjustment of the parties' property rights as distinguished from a provision for a mere right of support, and held that the lower court had no authority to reduce the amount of periodic alimony being paid by the husband, because to do so would abrogate a substantial contractual right of the wife. Because no agreement of the parties can deprive the court of jurisdiction in regard to the maintenance of a child the court allowed a reduction in child-support payments to stand.

In *Gartin v. Gartin*,³⁹¹ the complaint by the husband alleging cruel and inhuman treatment, and the counterclaim by the wife on the same grounds were dismissed; the husband appealed and the court affirmed the dismissal. In so doing the court said that the chancellor simply found that the parties were truthful in their denials of each others' claims, but were not truthful in their own affirmative claims.

In *Carter v. Carter*,³⁹² where the husband sued for divorce and the wife counterclaimed, the Court of Appeals affirmed the chancellor's decision awarding the divorce to the husband only, and held that since there was substantial evidence to support a finding that the wife was wholly at fault, and that no estate was accumulated during the marriage, the wife was not entitled to alimony as a matter of right. The court distinguished the case of *Heustis v. Heustis*,³⁹³ relied upon by the wife, by saying that since there was no estate accumulated here, the *Heustis* principle did not apply. The court had held in the *Heustis* case that regardless of who is at fault in the divorce, if the wife does not have a sufficient estate in her own right, and has made

³⁹⁰ 389 S.W.2d 914 (Ky. 1965).

³⁹¹ 384 S.W.2d 298 (Ky. 1964).

³⁹² 382 S.W.2d 400 (Ky. 1964).

³⁹³ 346 S.W.2d 778 (Ky. 1961).

a substantial though indirect contribution, through performing her duties as a housewife, to the estate accumulated by the husband during the marriage, she should be compensated for it in the form of alimony. The court found the *Carter* case easily distinguishable in light of the husband's testimony that during the marriage it cost more for them to live than they both earned and that his net worth was no more then (at the time of the divorce action) than it was at the time of the marriage.

The question of fraud in procuring the divorce was before the court at least two times during the last year, but in completely different factual situations. In *McDaniel v. McDaniel*,³⁹⁴ the divorce decree was procured by fraud and perjury as to residence on the part of the mother who was ultimately awarded custody of the child. The father attempted to set aside that portion of the divorce judgment granting custody to the mother by collateral attack on the divorce decree. The court, in affirming the lower court's refusal to set aside the judgment, relied on the rule that the welfare of the child should control, despite the "unusual circumstances" that were presented. The lower court had in effect treated the matter as a reconsideration of the custody order and decided to make no change in it in view of the changed conduct on the part of the mother since the divorce action. The Court of Appeals thought that the ruling may have been induced by the rule that courts favor granting the custody of young female children to the mother.

In the other "fraud" case, *Hanshaw v. Mullins*,³⁹⁵ the court refused to give full faith and credit to a judgment of divorce in Georgia because the wife had been enticed to return there for service of process. This refusal to recognize the Georgia judgment, which had awarded the divorce and custody of five infant children to the husband, was based on an assumption by the court that a Georgia court of equity would not allow fraud to be perpetrated on it by the enticement of the wife into the state to obtain jurisdiction over her. The divorce and custody of the children was awarded to the mother in an action in the Laurel Circuit Court, and was affirmed by the Court of Appeals. The court, in affirming, cited *Williams v. North Carolina*³⁹⁶ and said that the jurisdiction of sister states to render a divorce decree is always subject to inquiry by the courts of this state, and that since there was a denial of jurisdictional due process in the

³⁹⁴ 383 S.W.2d 344 (Ky. 1964).

³⁹⁵ 385 S.W.2d 186 (Ky. 1964).

³⁹⁶ 325 U.S. 226 (1945).

Georgia proceeding, that decree would not be entitled to full faith and credit in Kentucky.

*Lebus v. Lebus*³⁹⁷ contains interesting dictum affecting the matter of procedural divorce law. There the husband attempted to appeal an order of the chancellor awarding 374 dollars and thirty cents per month alimony and child maintenance pendente lite to the wife. Since the order appealed from was an interlocutory one, the court denied the appeal and refused to decide the case on the other issue raised by the appellee, namely that there was not a sufficient jurisdictional amount under KRS 21.060 to entertain the appeal. However the court noted that (had the order been otherwise appealable) there existed a dilemma, since one must appeal within thirty days from the entry of judgment under CR 73.02 and one could not wait to appeal until sufficient additional contested installments had become due under the judgment. By way of dictum the court solves (or will solve) this dilemma by finding the jurisdictional amount in the projected ultimate liability under the judgment. The court said:

In final orders awarding alimony and support payments in installments, the right to and the obligation to make future payments is fixed. It is not realistic to say that the amount in controversy is the amount which has accrued under the judgment at the time of taking an appeal. The contested amount of future payments is certainly in controversy. If under ordinary circumstances and in due course the installments in dispute will reach the sum of \$2500.00, a sufficient amount is involved to give this court jurisdiction under KRS 21.060 . . . [and] to authorize an appeal as a matter of right.³⁹⁸

The question whether credit for alimony and/or child-support payments pendente lite should be allowed as a credit against total lump-sum awards came before the court three times last year. In *Heustis v. Heustis*³⁹⁹ the court held that the lump-sum award could not be reduced by the amount of the pendente lite payments where the chancellor took such payments into consideration and expressly disallowed them as a credit.

In *Hickey v. Hickey*,⁴⁰⁰ the court expressly overruled *Wheeler v. Wheeler*⁴⁰¹ and *Oldham v. Oldham*⁴⁰² where credit for payments pendente lite had been allowed on appeal. In both of these overruled cases, however, the court found that the amount of the lump-sum

³⁹⁷ 382 S.W.2d 873 (Ky. 1964).

³⁹⁸ *Id.* at 874.

³⁹⁹ 381 S.W.2d 533 (Ky. 1964).

⁴⁰⁰ 383 S.W.2d 114 (Ky. 1964).

⁴⁰¹ 238 S.W.2d 1001 (Ky. 1951).

⁴⁰² 259 S.W.2d 42 (Ky. 1953).

award was unreasonable and had allowed the credit for pendente lite while adjusting the total award. The decision in the *Hickey* case which was followed in *Brodia v. Brodia*,⁴⁰³ appears to be the current law on the matter. It is that where the lump-sum award is reasonable, it will be presumed that all proper factors, such as payments pendente lite, were considered by the Chancellor and no credit will be allowed for alimony and/or child-support payments pendente lite.

⁴⁰³ 388 S.W.2d 617 (Ky. 1964).

VIII. ETHICS

The major case in the field of ethics during the past year was probably *In re Shumate*.⁴⁰⁴ There it was held that where an attorney is convicted of embezzling money which came into his charge as trustee in bankruptcy of the United States District Court and knowingly and fraudulently concealed money from the trustee in bankruptcy and from the creditors in the bankruptcy proceedings, in violation of 18 U.S.C.A. sections 152-53, he may be disbarred on the ground of "moral turpitude" without inquiring into the merits of his guilt or innocence because such an inquiry is foreclosed by the judgment of conviction. The court said, "It may not be debated that 'moral turpitude' is inherent in the felony conviction of this respondent."⁴⁰⁵ This case was distinguished from *Kentucky State Bar Ass'n. v. McAfee*⁴⁰⁶ and *Kentucky State Bar Ass'n. v. Brown*⁴⁰⁷ on the basis of the presence of "moral turpitude." There it was held that a conviction for failure to pay income taxes did not involve "moral turpitude." In both of these cases the Kentucky court relied upon the decision of the California case of *In re Halliman*,⁴⁰⁸ which held that an intention to defraud the United States government is not an essential element in the offense for which the respondent there was convicted and that such offense does not involve moral turpitude.

*In re Porter*⁴⁰⁹ involved an attorney who induced his youthful female secretary to make a false affidavit in which she accused a former client of his of a criminal offense against her in an effort to obtain a warrant which would be used by way of a threat to deter the client from pursuing a monetary claim that the client was asserting against the attorney. The attorney was disbarred. The court also determined that the taking of the secretary's deposition by the trial committee only two days subsequent to the filing of the charge did not constitute the premature holding of a trial in violation of RCA 3.340.

In the disciplinary proceeding of *In re Ray*⁴¹⁰ the owner of a piece of mortgaged real estate was seeking legal aid when in fact he needed financial aid. The owner transferred his interest to the attorney under a trust arrangement. After the dealings with the attorney had been completed the client had nothing and the attorney had 1,300 dollars. In ordering that the attorney be suspended from engaging in

⁴⁰⁴ 382 S.W.2d 405 (Ky. 1964).

⁴⁰⁵ *Id.* at 406.

⁴⁰⁶ 301 S.W.2d 899 (Ky. 1957).

⁴⁰⁷ 302 S.W.2d 834 (Ky. 1957).

⁴⁰⁸ 43 Cal. 2d 243, 272 P.2d 768 (1954).

⁴⁰⁹ 390 S.W.2d 897 (Ky. 1965).

⁴¹⁰ 390 S.W.2d 899 (Ky. 1965).

the practice of law in Kentucky, the court pointed out that they were not convinced that there was any fraudulent conduct but only that the "offense was attributable mainly to his failure to appreciate fully the high trust responsibilities that rest upon an attorney in a financial transaction with his client."⁴¹¹

⁴¹¹ *Id.* at 900.

IX. INSURANCE

*State Farm Mut. Ins. Co. v. Martin*⁴¹² involved a suit by the appellee against her alleged insurance carrier to recover the amount of judgment plus an attorney fee arising out of an automobile accident case in which she had been the defendant. The insurer asserted that the policy in question was canceled because of a "material" misrepresentation in her application where she answered that there had been no cancellation or refusal of any other insurance company to issue a policy to her or any member of her household. KRS 304.656 provides substantially that misrepresentations in application for insurance policies will not prevent recovery unless they are material or fraudulent. The trial judge found as a matter of fact that the testimony of an employee of another insurance company that its records showed appellee's policy with them had been sent by unregistered mail, but that the file containing the said policy was lost, was rebutted by the testimony of the appellee and her son that they had received no notice. The Kentucky Court of Appeals then held that since there had been no cancellation because of the failure to give notice, there was no misrepresentation in the application for insurance.

The rule that one who is entrusted by an insurance company with the apparent power to adjust a loss ordinarily has the authority to waive notice or proofs of loss was reaffirmed in *Fidelity & Guar. Ins. Underwriters, Inc. v. Gregory*.⁴¹³ In this case another factual situation was merely fitted within the general rule.

With respect to the duty of a liability insurer to settle or compromise a claim made against its insured, Kentucky has adopted the rule followed by the majority of states. That rule is liability will be imposed in excess of policy limits only when the insurer acts in bad faith, thus in *Harrod v. Meridian Mut. Ins. Co.*⁴¹⁴ evidence showing that the failure of the insurer to settle a claim was the result of error, inaction, or mistake supported the trial court's finding that no issue of "bad faith" was raised.

*Rudder v. Ohio State Life Ins. Co.*⁴¹⁵ held that it was error to deny a directed verdict where the insured introduced evidence showing that he was wholly and continuously disabled from following his regular occupation as well as any occupation for which he was suited by education, training, and experience when the insurer's only medical expert was merely speculative and conjectural. This case in no way

⁴¹² 382 S.W.2d 83 (Ky. 1964).

⁴¹³ 387 S.W.2d 287 (Ky. 1965).

⁴¹⁴ 389 S.W.2d 74 (Ky. 1964).

⁴¹⁵ 389 S.W.2d 448 (Ky. 1965).

subtracts from *Prudential v. Johnson*⁴¹⁶ which held that permanence of disability is a jury question. It merely reaffirms the rule that the submission of an issue to a jury is improper when determination of an issue would be based upon speculation or conjecture.

In *Marsh v. Ashley*,⁴¹⁷ the insurance policy on a horse provided that the policy did not include intentional slaughter of the animal except in one of the following circumstances: (1) where a veterinary surgeon appointed by the underwriters shall first give a certificate that destruction is necessary to terminate incurable suffering; (2) where the underwriters consent to the destruction of the animal; or (3) where a certificate is given by a qualified veterinary surgeon appointed by the assured that the suffering is incurable and so excessive that immediate destruction is imperative for humane reasons without waiting for the appointment of a veterinary surgeon by the underwriters. The court concluded there was no probative evidence that the insurer arbitrarily withheld its consent to the destruction of the animal simply because the animal was not killed until eleven months after the injury. The third alternative above was not met despite this eleven month delay, even though two veterinarians stated within six weeks after the injury that the animal ought to be killed. The delay merely shows that the owner hoped that the injury was not of such a serious nature as to warrant the destruction of the horse.

It was held in *Louisville Auto. Club v. Commonwealth, Dep't of Ins.*⁴¹⁸ that a public hearing was not necessary in order to provide for a raise in insurance rates. The statute⁴¹⁹ here did not require a public hearing, but there was a regulation which purported to so require. The special deputy commissioner took the view that there was a conflict between the two provisions thereby giving him discretionary power over a public hearing. The court took the view that such a conclusion would be contrary to *Becker v. Yeary*,⁴²⁰ which had held that the regulations of the Division of Motor Transportation setting forth the circumstances under which a hearing would be had, required a hearing under those circumstances even though discretionary under statute.⁴²¹ But the court was able to resolve the apparent conflict by another part of the insurance regulations which in fact made the granting of a public hearing discretionary under the regulations as well as under the statute.

⁴¹⁶ 265 Ky. 767, 97 S.W.2d 793 (1936).

⁴¹⁷ 381 S.W.2d 628 (Ky. 1964).

⁴¹⁸ 384 S.W.2d 75 (Ky. 1964).

⁴¹⁹ KRS 304.627(6).

⁴²⁰ 278 S.W. 2d 632 (Ky. 1955).

⁴²¹ KRS 281.210.

X. LABOR LAW

One of the two labor law cases decided by the Court of Appeals this term was *Local 227, Amalgamated Meat Cutters & Butcher Union AFL-CIO v. Fleischaker*.⁴²² Defendant union had represented plaintiff's employees since 1945. In 1952, a disagreement arose between the defendant union and plaintiff over plaintiff's refusal to cease supplying a company which the union was attempting to organize. After plaintiff's refusal, the union told plaintiff, in substance, that he would regret his decision. Therefore, relations between plaintiff and defendant union became progressively worse. The union refused to discuss the terms of renewal contracts with plaintiff, but it did negotiate contracts with competitors of plaintiff, which gave these companies a substantial competitive advantage in lower resultant labor costs. On at least one occasion, defendant union disrupted plaintiff's work schedule by calling a union meeting during working hours. In 1959, during a strike and picketing of plaintiff's plant, non-union workers were intimidated with threats and acts of personal violence, and acts of violence were committed against plaintiff's business property. Although plaintiff's profits had steadily risen prior to his disagreement with the union, after the disagreement profits and sales declined sharply, and plaintiff ceased business operations in September 1960.

Plaintiff instituted this action under KRS 437.110-.120 to recover damages. KRS 437.110(2) provides that, "no two or more persons shall confederate or band themselves together and go forth for the purpose of molesting, damaging or destroying any property of another person, whether the property is molested, damaged or destroyed or not." KRS 437.120 provides for actual and punitive damages for violation of KRS 437.110(2). In the circuit court, judgment was entered on a verdict awarding plaintiff 30,000 dollars compensatory damages and 20,000 dollars punitive damages.

The Court of Appeals held that, from the evidence, the jury could reasonably conclude that the union and its officials unlawfully conspired among themselves to force plaintiff out of business, and, in pursuance of that objective, caused damage to the plaintiff's business.

In answer to the union's contention that the National Labor Relations Board (hereinafter referred to as the Board) had exclusive jurisdiction over the controversy since it involved unfair labor practices, the court pointed out that the National Labor Relations Act,⁴²³ as amended in 1959, provides that the Board may, in its discretion, decline to assert jurisdiction over any labor dispute where, in the

⁴²² 384 S.W.2d 68 (Ky. 1964).

⁴²³ 29 U.S.C. §§ 164(c)(1)-(2) (1935).

opinion of the Board, the effect of the labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction, and that where the Board so declines to assert its jurisdiction, nothing in the National Labor Relations Act shall be deemed to bar state courts from assuming jurisdiction over the dispute. Therefore, since the Board has established a 50,000 dollar annual inflow or outflow standard for asserting its jurisdiction over non-retail enterprises,⁴²⁴ and a 500,000 dollar annual gross sales standard for asserting its jurisdiction over retail enterprises,⁴²⁵ and since plaintiff's business fell below either of these standards, the Court of Appeals held that the Board had declined jurisdiction, and that the trial court could properly assume jurisdiction over the controversy.

The court further held that, since the acts in question were found by the jury to be in furtherance of a conspiracy to damage plaintiff's business, the union's contention that the acts were committed to achieve a legitimate purpose of the union was without merit.

In *Cabe v. City of Campbellsville*,⁴²⁶ the Court of Appeals held that, where a finding of the Prevailing Wage Review Board was supported only by hearsay evidence, although better evidence was readily available, and the finding was in conflict with the testimony of several local contractors, the finding was not supported by substantial evidence, and, therefore, could be modified by the circuit court. This case is merely a restatement of the "residuum rule,"⁴²⁷ which is, in essence, that the admission of hearsay evidence before an administrative board is not prejudicial, but that the hearsay evidence alone will not support a finding—that is, there must be some reliable and substantial evidence, according to the common law rules of evidence, upon which a finding may rest.

⁴²⁴ *Siemons Mailing Serv.*, 122 N.L.R.B. 13 (1958).

⁴²⁵ *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 17 (1958).

⁴²⁶ 385 S.W.2d 51 (Ky. 1964).

⁴²⁷ *Valentine v. Weaver*, 191 Ky. 37, 228 S.W. 1036 (1921).

XI. MUNICIPAL CORPORATIONS

The Kentucky Court of Appeals decided seventeen cases concerning municipal corporations during the last term. Most of these decisions involved specific municipal ordinances or state statutes governing the various classes of cities and were therefore limited to statutory construction and interpretation.

A. GENERALLY

One of the most important decisions, *Commonwealth v. Beasy*,⁴²⁸ raised the question of the validity of an ordinance of the city of Louisville prohibiting discrimination in service, in places of public accommodation, on account of race, color, religious beliefs, ancestry or national origin. The owners of two local restaurants were brought before the police court on warrants charging them with violating the ordinance in refusing to serve food to Negroes. The police court dismissed the charges and the Commonwealth appealed both cases. The Jefferson Circuit Court held the ordinance unconstitutional and the Commonwealth again appealed. In reversing Court of Appeals held that the antidiscrimination ordinance did not violate constitutional rights of property or contract.

In answer to the contention that a Kentucky municipality does not have the power to enact penal legislation prohibiting discrimination in places of public accommodation, the court said that Louisville had adequate police power under the general charter for cities of the first class, particularly KRS 83.010, to enact a penal discrimination ordinance. The court pointed out that in *Fowler v. Obier*,⁴²⁹ it had been held that the police power granted by charter to cities of the first class is as broad as the police power of the state.

The contention was also made that the ordinance was invalid because it provided that the city director of law shall prosecute violators of the ordinance; whereas KRS 69.430, which creates the elective office of prosecuting attorney of the police court, states that in all cases coming before the police court the prosecuting attorney shall represent the Commonwealth or the city. The court held that under the statute the prosecution must be conducted principally by the prosecuting attorney or his assistant, and that to the extent that the ordinance purported to exclude the prosecuting attorney from his prosecuting authority, it was invalid. However, the court said the invalidity of that portion of the ordinance did not require that the entire ordinance be held void. Applying the test of severability set

⁴²⁸ 386 S.W.2d 444 (Ky. 1965).

⁴²⁹ 224 Ky. 742, 7 S.W.2d 219 (1928).

forth in KRS 446.090, the court found that the remaining portions of the ordinance were not so essentially and inseparably connected with and dependent upon the invalid part, or so incomplete and incapable of standing alone, as to make it apparent that the board of aldermen would not have enacted the remainder without the invalid section.

In another major case, *Ridings v. City of Owensboro*,⁴³⁰ Owensboro annexed three tracts of land located on two public highways and ranging from one-half to two miles from the city boundary. The ordinances also annexed the highways themselves from the city limits to the tracts. The action was brought by two citizens to enjoin the enforcement of the ordinance. The circuit court dismissed the action and the plaintiffs appealed. The Court of Appeals reversed holding that the annexation of two highways for the sole purpose of providing contiguity for the three annexed tracts of land was a mere subterfuge which could not supply the necessary contiguity for the three tracts to which they led. The court made clear that although the Kentucky annexation statutes (except for KRS 81.280 relating to annexation of industrial plants) do not in terms limit annexation to contiguous territory, such a limitation is inherent in the statutes.

The court carefully considered whether territory may properly be considered to be contiguous if its contiguity exists only through a corridor or finger. It held that the proper contiguity should not be found to exist unless the corridor or finger itself has a municipal value, unless it alone serves some municipal purpose. Otherwise, the use of the corridor must be considered a mere subterfuge. The court stated that the impropriety of a corridor annexation would not render the annexation void, but only make it subject to being set aside as an abuse of discretion. Thus the court concluded that the annexations should have been set aside as abuses of discretion since the three annexed tracts had no contiguity to the city other than through the highways, and the highways themselves had not been shown to be of any municipal value or to serve any municipal purpose.

A second Owensboro case, *City of Owensboro v. Smith*,⁴³¹ is an action wherein the Daviess Circuit Court rendered a judgment holding a city ordinance prohibiting licensing of pinball machines for which federal gaming stamps had been secured ultra vires. On appeal, the court held that the city, both under its inherent police power and under statute applicable to second class cities, was fully empowered to enact the ordinance, notwithstanding KRS 137.34 through 137.410

⁴³⁰ 383 S.W.2d 510 (Ky. 1964).

⁴³¹ 383 S.W.2d 902 (Ky. 1964).

which provides a state license for such machines upon payment of a ten dollar annual fee. The court held that the Commonwealth had not preempted the field of licensing of coin operated amusement machines. The court said that statute which set up the excise tax on the operation of amusements goes no farther than stating the Commonwealth's interest in receiving ten dollars per machine from the owner and does not purport to remove coin operated devices from regulation by cities.

The court also emphasized that KRS 84.190(2) expressly gives second class cities authority to license, tax, regulate or suppress instruments used for public amusement. The court noted that pinball machines can be easily converted to gambling purposes, and that it is an established principle of law that articles which lend themselves to illegal uses are subject to police powers of the state and municipalities.

*Norrell v. Judd*⁴³² is an action by a taxpayer and by a private corporation for furnishing television cable service, of which the taxpayer was president and chief stockholder, against the Municipal Housing Commission of Frankfort and another corporation furnishing television cable service to have the companies put in an equal competitive position. The court, in a previous ruling,⁴³³ had held that the contract between the municipal housing commission and the company furnishing television cable service, which contract allowed the company to use electric poles, was void and enjoined the company from furnishing any service due to a conflict of interest created by an officer of the commission being on the company's board of directors.

In the instant case the court ruled that it was not necessary for the company to remove its facilities in order to put all television companies in an equal competitive position because taxpayers could have no interest in or benefit from requiring the company to remove facilities which it would have an immediate right to replace. The commission had adopted uniform regulations which had placed all television cable companies on an equal footing, except that one corporation's equipment was already in place and its customer relationship established.

The court reiterated that a taxpayer need not show that the public will be damaged if the relief is denied,⁴³⁴ but there must be some reasonable relationship between the particular relief sought and the public interest. Here the public purpose was achieved when the con-

⁴³² 387 S.W.2d 7 (Ky. 1965).

⁴³³ *Norrell v. Judd*, 374 S.W.2d 192 (Ky. 1964).

⁴³⁴ *Kentucky Util. Co. v. Ginsberg*, 255 Ky. 148, 72 S.W.2d 738, 741 (1938).

tracts were stricken down. The court stated that only the personal interests of the individual plaintiffs had come up short of full requital.

In *O'Bryan v. City of Louisville*,⁴³⁵ taxpayers instituted proceedings challenging the validity of the city's proposed zoo operation. The Court of Appeals held that the city and the James Graham Brown Foundation could form a non-profit corporation for the purpose of establishing and managing a zoo. On the question of whether Louisville was authorized to operate a zoo the court found that KRS 97.010(1) afforded ample statutory basis for the activity although not specifically authorizing a zoo. The court said a zoo qualified for inclusion in the statute's authorization of "parks, playgrounds and recreation centers."

On the question of the legality of the method of operation the court also found for the city. The zoo was to be operated by a commission subject to the advice and direction of the city. The court followed several Kentucky cases⁴³⁶ in holding that it is appropriate for a municipal corporation to use others in the performance of certain administrative or ministerial functions.

In *Griffin v. City of Paducah*,⁴³⁷ taxpayers of a second class city challenged the validity of an ordinance creating the position of director of public safety and prescribing duties of the office. The Court of Appeals held that the ordinance did not violate KRS 89.580(1) enabling the board of commissioners to create by ordinance administrative boards reasonably necessary, or KRS 89.580(2) providing that enablements of KRS 89.580(1) do not apply to police and fire departments in second class cities, or KRS 95.430 vesting in the city legislative body the control of police and fire departments. The court pointed out that the board did not abrogate its own duties, but retained full authority. The court emphasized its recognition and approval of the delegation of ministerial or administrative functions to subordinate officials, even, though nominally, all administrative powers are vested in the municipal legislative body.⁴³⁸

*Louisville & Jefferson County Metropolitan Sewer Dist. v. Kirk*⁴³⁹ is an action by a property owner against the county metropolitan sewer district for damage to plaintiff's residence resulting from breach of an easement contract by failing to properly maintain a sewer beneath the residence. The court held that confining the jury's in-

⁴³⁵ 382 S.W.2d 386 (Ky. 1964).

⁴³⁶ *Jefferson County v. Jefferson County Fiscal Court*, 220 Ky. 678, 299 S.W. 209 (1927); *Board of Trustees of House of Reform v. City of Lexington*, 112 Ky. 171, 65 S.W. 350 (1901).

⁴³⁷ 382 S.W.2d 402 (Ky. 1964).

⁴³⁸ *Kohler v. Benckart*, 252 S.W.2d 854 (Ky. 1952).

⁴³⁹ 390 S.W.2d 182 (Ky. 1965).

spection to the residence damaged as the alleged result of the breach was not reversible error on the ground that it forced the jury to disregard the sewer district's evidence relating to alleged subsidence in other areas away from the sewer.⁴⁴⁰ The trial judge had determined that it would be impractical to permit the jury to view other property merely because it was mentioned in the testimony of witnesses. The court held that this was a reasonable exercise of the discretion given the trial judge.

*City of Nicholasville v. Scott*⁴⁴¹ adjudicated an action for damages for personal injuries suffered in a fall on a city sidewalk. The court held that where a portion of a sidewalk was raised about one inch and the plaintiff had no knowledge at any time of such defect, was unfamiliar with the street and her ability to see was impaired by mist and fog, the evidence was sufficient to establish the city's negligent maintenance of the particular sidewalk. The city's contention that the defect in the sidewalk amounted to nothing more than a condition of unevenness in its surface and therefore was not such a hazard as to impress the mind of a reasonably prudent person that the sidewalk was dangerous was rejected on the basis of several Kentucky cases⁴⁴² in which the court had refused to instruct that such defects were too trivial to render a sidewalk unsafe for pedestrians who exercised ordinary care.

In another personal injury action, *Burton v. Somerset City Hosp.*⁴⁴³ a patient sued to recover for injuries sustained in the city hospital when he fell from his hospital bed. The Court of Appeals, following *Haney v. City of Lexington*,⁴⁴⁴ held that the city was not immune from liability for any injuries sustained by a patient in a city hospital caused by the negligence of the hospital.

B. ELECTIONS

The Court of Appeals handed down six decisions in the field of elections last term, two of which were departures from previous case law and four of which were only supplements.

Both changes were the result of new legislation. In *Stewart v. Burks*,⁴⁴⁵ the court held that the amendment of KRS 118.080, making it read: "the signer of more than one petition shall not be counted on

⁴⁴⁰ KRS 29.301.

⁴⁴¹ 388 S.W.2d 612 (Ky. 1965).

⁴⁴² *Louisville v. Verst*, 308 Ky. 46, 213 S.W.2d 517 (1948); *Louisville v. Wheeler*, 301 Ky. 222, 191 S.W.2d 386 (1945); *Cynthiana v. Sersion*, 261 Ky. 667, 88 S.W.2d 672 (1935).

⁴⁴³ 388 S.W.2d 134 (Ky. 1965).

⁴⁴⁴ 386 S.W.2d 738 (Ky. 1964).

⁴⁴⁵ 384 S.W.2d 316 (Ky. 1964).

either," applies to a school board election and prevents a candidate from being entered on the ballot whose petition had been signed by people who also signed his opponent's. Striking the names of duplicate signers had left the petition in question with less than the minimum number of signatures. The court also ruled that the action to enjoin the county clerk from entering the name on the ballot could be brought by three electors: "the public interest in the subject matter is such that any voter or citizen who would be affected, though not specifically, has standing in court to question the sufficiency of the nominating petition involved in this area."⁴⁴⁶ The procedural question raised in the case was before the court for the first time. The amendment of the statute superseded the doctrine of *Huie v. Jones*⁴⁴⁷ that a person signing more than one petition would be counted only on the first filed.

Amendments to KRS chapter 126, absentee voting law, also came into consideration by the court. The title of KRS 126.145, "An Act Relating to Absentee Voting," was held, in *Hallahan v. Cranfill*,⁴⁴⁸ to sufficiently express the subject of the act to comply with the requirement to that effect in Kentucky Constitution section 51. Also, to prevent nullifying ambiguities, the same KRS section was construed to be limited on its terms to members of United States services. The court held further that KRS 126.225(1), requiring public examination of applications for absentee ballots to be conducted by the County Board of Election Commissioners and county clerk beginning on the nineteenth day before the election, was not void merely because the Board of Commissioners working alone could not complete the job in the allotted time. The court noted the job could be completed if the officers would employ deputies for assistance, as provided by KRS 61.035. The fourth point ruled on by the court was that KRS 126.225(1) impliedly amended KRS 117.725 in that the new statute clearly intended that City of Louisville registration records be made available to county election officials. Finally, the court decided the statutes were valid despite the absence of provision for protest or review, because absentee voting is a privilege granted by the legislature and not a constitutional right. In 1960 another similar set of absentee voting statutes had been declared void by the court in *Queenan v. Russell*.⁴⁴⁹ That case was distinguished in the *Cranfill* opinion on the ground it had designated an examination date five days closer to the election.

⁴⁴⁶ *Id.* at 318.

⁴⁴⁷ 362 S.W.2d 287 (Ky. 1962).

⁴⁴⁸ 383 S.W.2d 374 (Ky. 1964).

⁴⁴⁹ 339 S.W.2d 475 (Ky. 1960).

Until this year there had been no cases in Kentucky dealing with the issue of the validity of combining two different propositions within the same question on a ballot. In *Hulbert v. Board of Educ. of Louisville*,⁴⁵⁰ the court, in a declaratory judgment action, held valid the presentation to the voters, by the Board of Education of Louisville and Jefferson County, of the combined propositions of an additional ad valorem property tax and the imposition of business, trade, occupational, etc. license fees on the same ballot. The court reasoned that the combination presented an essentially unified scheme, all parts of which were reasonably related. Furthermore, no valid reason appears why the voter should have a right to reject part of a program which the proposing authorities deemed essential to the whole.

Another piece of recent legislation, KRS 118.040, extended general election voting hours to 6:00 p.m. and fixed voting on Standard Time. The court, in *Hallahan v. Sawyer*,⁴⁵¹ handed down a ruling that the time requirements set up in chapter 118 would not amend by implication chapter 119, which designates the closing time for primary elections as 5:00 p.m. The court noted there is a long standing rule that "before a statute shall be considered amended by implication by a later statute, the two statutes must be repugnant to each other and be irreconcilable, or the later act must cover the whole subject of the earlier act."⁴⁵²

In *Ausmus v. Slusher*,⁴⁵³ the court ruled that a petition for a local liquor option election which contained 1,125 names in addition to the required 875 and which showed a "good faith attempt" by the signers to comply with KRS 242.020(2)'s specification of date and post office address after each signature would not be dismissed because some slight discrepancies appeared, such as ditto marks indicating identical information. The case followed an earlier decision by the court that the statute requiring the information after the signature is merely directory and the omission of a few dates and addresses would not invalidate the petition.⁴⁵⁴

The final case in this area, *Secrest v. Wellman*,⁴⁵⁵ concerned an action for an election recount in a county school board race. The court held that eye-witnesses' evidence produced by the contestant in the action which showed that ballot boxes were not tampered with during a five-minute period when the commissioners were absent

⁴⁵⁰ 382 S.W.2d 389 (Ky. 1964).

⁴⁵¹ 390 S.W.2d 664 (Ky. 1965).

⁴⁵² *Id.* at 665.

⁴⁵³ 382 S.W.2d 395 (Ky. 1964).

⁴⁵⁴ *Cassidy v. Jewell*, 105 Ky. 810, 268 S.W. 643 (1937).

⁴⁵⁵ 387 S.W.2d 290 (Ky. 1964).

from the counting room satisfied the contestant's burden of establishing the integrity of the ballots, and therefore the recount must proceed.

C. PUBLIC UTILITIES

There were two public utilities cases decided last term by the Court of Appeals. The first, *Weller v. McCauley*,⁴⁵⁶ was a taxpayers' action against the governing body of Middlesboro and the electric plant board of the city to prevent further proceedings for purchase or condemnation of the electrical facilities of Kentucky Utilities pursuant to KRS 96.550. The circuit judge dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. It was alleged that the board had not negotiated in good faith for the purchase of the property as required under KRS 96.580 and 96.590.

The Court of Appeals reversed the circuit court in holding that the question of good faith negotiations was put in issue by a complaint which alleged that the board was content to send only a notice of intent to purchase, did nothing during the sixty-day negotiation period, and then sent a letter appointing an appraiser. The court also held that while payment from an existing fund would be proper in connection with acquisition of an electric plant by the electric plant board of the city, use of the city's credit as a method of lending money to the electric board was improper under KRS 96.730.

In the second case, *City of Bardstown v. Louisville Gas & Elec. Co.*,⁴⁵⁷ Bardstown brought an action to set aside the public service commission's order denying its application for an order compelling the Louisville Gas and Electric Co. to furnish natural gas to the city from its nearby transmission line. The court held that the application was properly denied because the duty of a public utility is to render efficient service within the scope of that service as provided in its certificate of convenience and necessity, and here the gas company's certificate provided only for transmission of gas, not wholesaling. The court also ruled that the certificate issued to Bardstown for operation of a municipal gas system was conditioned upon obtaining an allotment of gas, and failing this, expired on its terms. A previous case had held that an electric company must render service to a community from a distribution line,⁴⁵⁸ but other Kentucky and Supreme Court cases dealing with transmission lines speak only of the duty of the public carrier to accept transports from producers seeking its service.

⁴⁵⁶ 383 S.W.2d 356 (Ky. 1964).

⁴⁵⁷ 383 S.W.2d 918 (Ky. 1964).

⁴⁵⁸ *Smith v. Kentucky Util. Co.*, 233 Ky. 68, 24 S.W.2d 928 (1930).

XII. PROCEDURE

The procedure cases decided during the last term of the Court of Appeals may be classified into four general categories: (1) Pre-Trial Procedure, (2) Trial Procedure, (3) Post-Trial Procedure, and (4) Appellate Procedure.

A. PRE-TRIAL

The cases decided in the last term dealing with pre-trial procedure involved discovery requests, statutes of limitation, and service of process.

1. Discovery

In the case of *Gregorich v. Jones*,⁴⁵⁹ an action for personal injuries arising out of an automobile accident, plaintiff agreed during the course of taking discovery depositions to furnish information concerning insurance, medical expenses, and days lost from work. Everything requested was furnished by plaintiff prior to the trial except information concerning insurance. Since plaintiff's deposition revealed that she had little knowledge concerning the insurance, the Court of Appeals held that refusal of a continuance was not clearly erroneous. In view of the information revealed by depositions, there was no showing of prejudice to any substantial rights of defendant.

2. Statute of Limitations

In *Turner v. Rust*,⁴⁶⁰ the appellant sued the appellee, a physician, for alleged malpractice in failing to properly place appellant's hip in socket. The trial court dismissed the complaint on the ground that the action was barred by the Statute of Limitations since the complaint was filed two years after the doctor had last examined appellant. In upholding the dismissal, the court reaffirmed the existing rule in Kentucky that the Statute of Limitations in a malpractice suit begins to run at the time the cause of action accrues, *i.e.*, at the time of the alleged negligent act or injury, and not when the plaintiff discovered the result of the alleged negligence.⁴⁶¹ Since the appellant here failed to disclose an affirmative act or a fraudulent misrepresentation by the doctor, which prevented him from filing the action within the required time, there was no basis for appeal.

⁴⁵⁹ 386 S.W.2d 955 (Ky. 1965).

⁴⁶⁰ 385 S.W.2d 175 (Ky. 1964).

⁴⁶¹ *Philpot v. Stacy*, 371 S.W.2d 11 (Ky. 1963).

3. Service of Process

In *Williams v. Carters' Bros. Co.*,⁴⁶² the court was called upon for the first time to decide the validity of Kentucky's "non-resident motorists" statute as amended by the 1954 legislature.⁴⁶³ This enlargement provided that service on the Secretary of State as agent of a non-resident motorist's personal representative conferred jurisdiction over the non-resident's personal representative. The court upheld this statute, KRS 188.020, as a valid exercise of police power by the state. Relying on the "implied consent" doctrine of *Hess v. Pawloski*,⁴⁶⁴ the court reasoned that the personal representative should also be bound by the non-resident motorist's consent, and that a non-resident motorist's death should not terminate the rights of third parties and the Commonwealth of Kentucky which is attempting to safeguard its citizens from the negligent driving of non-residents. This decision reflects the overwhelming weight of authority. A similar statute was previously upheld in the United States' Sixth Circuit Court of Appeals.⁴⁶⁵ Prior to the enactment of KRS 188.020, a personal representative was limited to his own state either to sue or to be sued.

Another procedural point in this case involved CR 13.01 which allows joinder of actions. The court held that the trial judge properly overruled defendant's motion to dismiss an independent action brought by plaintiffs "when there was already pending in the same court an action between the same parties arising out of the same occurrence." The court reaffirmed that the purpose of CR 13.01 is to avoid multiplicity of trials.

B. TRIAL PROCEDURE

The cases decided during the last term concerning trial procedure included: (1) timely objection; (2) admissions; (3) voir dire examination of juries; (4) expert opinion; (5) jury's request for deposition; (6) a lunacy inquest; and (7) a directed verdict.

1. Timely Objection—Inconsistent Verdict

In *Phipps v. Bisceglia*,⁴⁶⁶ appellant brought an action for injuries sustained in an automobile accident. At trial appellant introduced evidence that he had suffered permanent injury from a broken neck. The jury awarded him 1,000 dollars. Two grounds on which ap-

⁴⁶² 390 S.W.2d 87 (Ky. 1965).

⁴⁶³ KRS 188.020.

⁴⁶⁴ 274 U.S. 352 (1927).

⁴⁶⁵ *Parrot v. Whistler*, 313 F.2d 245 (6th. Cir. 1953).

⁴⁶⁶ 383 S.W.2d 367 (Ky. 1964).

pellant urged reversal and a new trial were: (1) that the jury was improperly selected; and (2) that the verdict was erroneous. With respect to the first contention appellant claimed that after his counsel had struck three names from the jury list, the clerk changed the list by substituting an unacceptable juror for an acceptable one. The court held that the selection cannot be challenged where the objection is not timely. A motion made for the first time in the motion and grounds for a new trial is too late.⁴⁶⁷ With respect to the second contention, appellant insisted that the jury's 1,000 dollar award was not sufficient to cover damages for pain and suffering and permanent injuries. In reversing, the court reaffirmed the rule in Kentucky that where uncontroverted evidence as to elements of damages and the court's instructions in regard thereto are disregarded by the jury, a new trial will be awarded because of the inconsistency of the verdict.⁴⁶⁸

2. Admissions

In *Fletcher v. Indianapolis & Southeastern Trailways*,⁴⁶⁹ plaintiff brought an action for injuries sustained in an accident allegedly caused by the negligence of defendant's driver. Plaintiff, a passenger on defendant's bus, stated at the scene of the accident that defendant's driver was not at fault; he later reaffirmed that statement in a pre-trial deposition. The lower court treated plaintiff's statement as a judicial admission absolving defendant of any negligence and granted summary judgment for defendant. In reversing, the Court of Appeals held that in this type of case a determination of negligence must be based upon all the facts given by a party and not his judgment as to whom he thinks may or may not have been at fault. All the statements in the pre-trial deposition must be read together. Plaintiff's pre-trial statement created a sufficient doubt as to whether a genuine factual issue was present in the case. The court pointed out that this decision does not affect *Bell v. Harmon* which held that "statements under oath in a pre-trial deposition constitute a judicial admission. . . ."⁴⁷⁰

3. Examination of Jury—Voir Dire

In *Farrow v. Cundiff*,⁴⁷¹ an action for personal injuries arising out of an automobile accident, plaintiff was prohibited from asking the jury on voir dire if any of them had any scruples or objections against

⁴⁶⁷ *Crosthwaite v. Crosthwaite*, 151 Ky. 364, 151 S.W. 945 (1912).

⁴⁶⁸ *Smith v. Webber*, 282 S.W.2d 346 (Ky. 1955).

⁴⁶⁹ 386 S.W.2d 264 (Ky. 1965).

⁴⁷⁰ 284 S.W.2d 812 (Ky. 1955).

⁴⁷¹ 383 S.W.2d 119 (Ky. 1964).

returning a verdict for the full amount asked for if justified by the law and evidence. The Court of Appeals held that the lower court did not err in refusing counsel permission to ask this question. In an earlier case, however, the court upheld the lower court's discretion in permitting counsel to ask essentially the same question.⁴⁷² Yet, the two cases can be reconciled on the ground that the court is given wide discretion in permitting a voir dire examination in civil cases. It appears that the nature of this particular question here is immaterial since the whole record revealed the court's efforts to obtain a fair trial before an impartial panel of jurors.

In the case of *Clemons v. Harvey*,⁴⁷³ defendant appealed from an adverse judgment awarding damages to plaintiff for injuries received when he was hit by an automobile driven by defendant. On voir dire examination all the jurors had replied that they did not know the plaintiff. During a recess, however, one of the jurors was seen patting plaintiff on the head and talking with him. The juror had recognized the plaintiff as a relative of her son-in-law. Defendant's motion to set aside the swearing of the jury was overruled. In reversing, the Court of Appeals held that the relationship wasn't close enough to be inherently prejudicial, but when coupled with the show of affection, the trial judge should have concluded that there could not have been a fair trial. This decision reflects an application of existing law.⁴⁷⁴

4. Expert Opinion

In *Wells v. Conley*,⁴⁷⁵ an action arising out of an automobile collision, the lower court permitted a state trooper to offer expert opinion as to the paths of two vehicles leading up to the collision and their point of impact. This opinion was based in part upon: (1) gouge marks in the highway; (2) the position of the vehicles after the accident; and (3) the nature of the damages to the vehicles. Yet from the trooper's testimony it was apparent that his opinion was based primarily on the assumption that the vehicles moved only a few feet after the collision. The trooper presented a diagram showing that the vehicles must have collided a few feet from the point where the gouge marks were located. Plaintiff and defendant, the only surviving eyewitnesses, each testified that the other was in the wrong lane. The trooper's opinion placed the defendant's car in the wrong lane. Judgments on the jury's verdict were for plaintiffs. In reversing, the Court of Appeals held that the trooper's opinion was based on an

⁴⁷² *Temperly v. Sarrington's Adm'r*, 293 S.W.2d 863 (Ky. 1956).

⁴⁷³ 385 S.W.2d 496 (Ky. 1964).

⁴⁷⁴ *Stanley v. Brown*, 303 Ky. 481, 198 S.W.2d 35 (1946).

⁴⁷⁵ 384 S.W.2d 496 (Ky. 1964).

assumption that the vehicles moved only a few feet after colliding and was purely conjectural. This case is to be distinguished from existing law which permits an expert to testify as to the point of impact based on skid marks.⁴⁷⁶ There the expert's assumption is based on observed fact, while in the present case the assumption is based on conjecture. It appears that the real distinction should not be between fact and conjecture, but at what point do assumptions based on fact become conjectural?

In *Commonwealth, Dep't of Highways v. Mayes*,⁴⁷⁷ a professional realtor, testifying for property owner, erred in basing his determination of the property value on a non-compensable factor. The Court of Appeals held that the witness should not be dismissed if he is able to revise his figures by eliminating the improper factor, even though the determination remains the same.

5. Request for Depositions

In *Little v. Whitehouse*,⁴⁷⁸ a medical malpractice suit, the lower court refused to comply with the jury's request to take a deposition into the jury room. Appellant maintained on appeal that the judge erred in failing to tell the jury that portions of the deposition could be reread to them in the courtroom. Appellant's contention was based upon KRS 29.304, which permits a jury which disagrees as to testimony to be brought back into court "where the information required shall be given." The Court of Appeals held that rereading of the deposition was "information required" within the meaning of KRS 29.304 even though the jury had asked only to take the depositions into the jury room. Yet the trial judge's failure to advise the jury of this was not reversible error, since appellant's counsel made no objection or attempt to present the error. The decision reflects a rather liberal interpretation of KRS 29.304. It also reemphasizes application of a basic rule of civil procedure that a party may not raise an error on appeal if he does not call the error to the attention of the trial court.⁴⁷⁹

6. Lunacy Inquest

*Denton v. Commonwealth*⁴⁸⁰ involved a lunacy inquest at which defendant was adjudged to be mentally ill and incompetent to manage her own affairs. The only evidence introduced concerning defendant's mental condition were the affidavits of two examining physi-

⁴⁷⁶ *Sellers v. Cayce Mill Supply Co.*, 349 S.W.2d 677 (Ky. 1961).

⁴⁷⁷ 388 S.W.2d 125 (Ky. 1965).

⁴⁷⁸ 384 S.W.2d 503 (Ky. 1964).

⁴⁷⁹ CR 46; CR 51.

⁴⁸⁰ 383 S.W.2d 681 (Ky. 1964).

cians who were not present. That evidence was admitted over the objections of defendant's counsel. In reversing, the Court of Appeals held that the lower court erred in admitting that evidence. It held that a lunacy hearing is a quasi-criminal proceeding,⁴⁸¹ and as such, the rules of evidence should be the same as those in any criminal proceeding. The court noted that KRS 202.140 has attempted to shift the burden of proof from the Commonwealth to the defendant in a lunacy inquest. Since a lunacy inquest may result in depriving the defendant of his personal freedom and his property, the court reasoned that the defendant should be given the same constitutional protection afforded the accused in a criminal proceeding.⁴⁸² More specifically, it held that the defendant in a lunacy inquest is guaranteed the right of confrontation. This decision clearly rejects the assumption that the examining doctors need not appear at a lunacy inquest to testify.⁴⁸³

7. Directed Verdict

*Gullion v. Ewry*⁴⁸⁴ involved an action for damages sustained in an automobile collision. The case was submitted to the jury and judgment was for the plaintiff. On appeal defendant maintained he should have been granted a directed verdict. In affirming the lower court's decision, the court held that where testimony was in conflict as to how the collision occurred, there was no basis for a directed verdict, and the facts were properly submitted to the jury for their determination. This restates existing law.

C. POST-TRIAL PROCEDURE

Several cases were decided during this term of court dealing with appellee's failure to file a brief, allowance of interest from date of original judgment, and an appeal from a redocketing order.

1. Failure to File Brief

In *Commonwealth, Dep't of Highways v. Bennett*,⁴⁸⁵ a right-of-way condemnation case, appellee received an award for the land and improvements condemned. The Commonwealth appealed, but appellee failed to file a brief. The court held that upon failure of appellee to file a brief pursuant to RCA 1.260 (c) (3), the judgment

⁴⁸¹ *Cadden v. Commonwealth*, 242 S.W.2d 409 (Ky. 1951).

⁴⁸² Ky. Const. § 11.

⁴⁸³ Ky. Att'y Gen. Rep. 37.777.

⁴⁸⁴ 384 S.W.2d 315 (Ky. 1964).

⁴⁸⁵ 386 S.W.2d 733 (Ky. 1965).

would be reversed without considering the merits and a new trial would be granted. This decision restates existing law.

2. Judgments

In the case of *Elpers v. Johnson*,⁴⁸⁶ a multiple action arising out of an automobile collision, judgment was entered in plaintiff's favor on March 22, 1960. On that same day the trial court entered judgment n.o.v. for defendants. Plaintiffs appealed and the judgment n.o.v. was reversed with directions to enter judgment in accordance with the original verdict. Pursuant to that opinion the trial court entered judgment for plaintiffs on May 22, 1963, and allowed plaintiffs to recover the judgment with interest at 6 per cent per annum from March 22, 1960. Defendant appealed urging reversal of the allowance for interest from the date the judgment was originally entered. Defendant relied on KRS 360.040, which provides that "a judgment shall bear interest from its date." In affirming, the Court of Appeals adopted plaintiff's contention that the effect of the court's holding that the trial court erred in granting judgment n.o.v. was to hold that the original judgment "was never effectively lost but always in fact existed." This decision establishes a precedent in Kentucky case law; the question had never before been raised in our courts. The court relied in part on a Missouri case cited by plaintiff.⁴⁸⁷

3. Redocketing Order

In *Evans Elkhorn Coal Co. v. Owsley*,⁴⁸⁸ the circuit court entered an order allowing redocketing of the case for further proceedings. From this order an appeal was taken. The court refused to allow an appeal since the order to redocket was in no way final and was not a final adjudication of all the rights of the parties to the action. The court applied the existing rule in Kentucky that tests the appealable character of an order on whether it grants or denies the ultimate relief sought.⁴⁸⁹ An order redocketing a case clearly requires that further steps be taken before the parties rights can be determined.

D. APPELLATE PROCEDURE

The cases decided by the Court of Appeals during the last term involving appellate procedure are best separated into two categories:

⁴⁸⁶ 386 S.W.2d 267 (Ky. 1965).

⁴⁸⁷ *Reimers v. Frank B. Cornett Lumber Co.*, 273 S.W.2d 348 (Mo. 1954).

⁴⁸⁸ 388 S.W.2d 130 (Ky. 1965).

⁴⁸⁹ See, KRS 21.060 (1); CR 54.01.

- (1) those involving original proceedings in the Court of Appeals; and
- (2) those involving appeals from lower court decisions.

1. Original Proceedings

*Moore v. Pound*⁴⁹⁰ was an original petition for a mandamus to compel the circuit judge to grant a hearing on petitioner's motion to vacate a judgment sentencing him to prison. Petitioner asserted that he had filed his motion pursuant to RCr 11.42, "nearly five weeks ago" and that no action had been taken. The respondent judge was notified to make a response within ten days after this petition, but he failed to do so. The Court of Appeals granted the petition and directed the respondent to consider petitioner's motion. This restates existing law.⁴⁹¹

*Carrier v. Gardner*⁴⁹² was an original petition for writ of mandamus to require respondent judge to assign a date for hearing the motion filed in his court to vacate the judgment under which petitioner had been convicted. The respondent stated that the motion had been sustained and that a date for a hearing on the motion had been set. The Court of Appeals held that as a result of the fact set out in the response the petition became moot; the petition was dismissed.

In *Christoff v. Downing*,⁴⁹³ a petition was filed in the Court of Appeals seeking a writ of mandamus to compel the respondent, judge of the Jefferson Circuit Court, to set aside his order which stayed further proceedings on petitioner's personal injury claim against a dry cleaning concern. The order had been entered pursuant to CR 37.03⁴⁹⁴ when petitioner refused to authorize the Veterans Administration to disclose by deposition his medical records and history; a Veterans Administration regulation prohibited disclosure of medical records without consent of the person concerned. In dismissing this petition, the court held that petitioner's medical records were competent and material to a personal injury action and not protected from discovery. Petitioner had relied on *Bender v. Eaton*⁴⁹⁵ which the court pointed out was not a parallel case. In that case the court granted mandamus requiring the lower court to proceed with the trial because the party was not required to produce writings prohibited by CR 37.02 which were "writings obtained or prepared by the adverse

⁴⁹⁰ 395 S.W.2d 159 (Ky. 1965).

⁴⁹¹ Wahl v. Simpson, 385 S.W.2d 171 (Ky. 1964).

⁴⁹² 385 S.W.2d 153 (Ky. 1964).

⁴⁹³ 390 S.W.2d 153 (Ky. 1965).

⁴⁹⁴ CR 37.03 provides, in part, that a court may enter an order staying further proceedings where a party fails to comply with an order made under CR 34 to produce a document for inspection.

⁴⁹⁵ 343 S.W.2d 799 (Ky. 1961).

party, his attorneys, surety, indemnitor, or agent in anticipation of litigation or in preparation for trials.”⁴⁹⁶

*Shelby County Bd. of Educ. v. Wright*⁴⁹⁷ was an original proceeding in the Court of Appeals in which petitioner sought to prohibit the respondent judge from allowing a new trial in a tort case. Petitioner had been through three trials and had recovered a favorable verdict in the last. This proceeding was brought under section 110 of the Kentucky Constitution which allows resort to the Court of Appeals as a substitute for appeal in cases where great injury, irreparable by appeal, would result. In denying relief, the court reaffirmed the existing rule in Kentucky that vexation, delay, and expense that would result from the granting of a new trial do not constitute “irreparable injury” under the constitutional provision giving the Court of Appeals power to control inferior courts by issuance of writs.⁴⁹⁸ The court also reaffirmed that the granting of a new trial in a tort action is not an appeal order.⁴⁹⁹

2. Appeals From Lower Courts

In *Warner v. Commonwealth*,⁵⁰⁰ a prisoner appealed from the lower court’s judgment overruling his motion to vacate judgment. Appellant had been convicted as an habitual criminal approximately twenty years ago and had been sentenced to life imprisonment. Appellant’s motion to vacate judgment had been filed pursuant to RCr 11.42 on the ground that the indictment under which he was tried contained fatal defects. In affirming, the Court of Appeals held that any defects had been waived by appellant’s “failure to question the indictment in a proper and timely manner.”⁵⁰¹ Even if there had been no waiver, the court stated that a defective indictment will not support a collateral attack upon a judgment of conviction. This decision restates existing law.⁵⁰²

*Turner v. Thomas*⁵⁰³ was a habeas corpus proceeding brought in the lower court against the warden by a prisoner who maintained he was illegally restrained when brought back to Kentucky for completion of his sentence, after having been released to the supervision of Illinois parole authorities. The prisoner appealed from the lower court’s adverse judgment. In considering for the first time the ap-

⁴⁹⁶ *Ibid.*

⁴⁹⁷ 390 S.W.2d 654 (Ky. 1965).

⁴⁹⁸ *Ison v. Bradley*, 333 S.W.2d 784 (Ky. 1960).

⁴⁹⁹ See Clay, Kentucky Practice, CR 59.01, comment, and CR 73.01, comment.

⁵⁰⁰ 385 S.W.2d 77 (Ky. 1964).

⁵⁰¹ *Davis v. Commonwealth*, 129 S.W.2d 1030 (Ky. 1952).

⁵⁰² *Harrod v. Commonwealth*, 253 S.W.2d 574 (Ky. 1952).

⁵⁰³ 383 S.W.2d 379 (Ky. 1964).

plication of the Uniform Act for Out-of-State Parolee Supervision, KRS 439.560, the court held that Kentucky parole officials had not, by placing appellant under supervision of Illinois parole authorities, relinquished their power to revoke his parole and return him to Kentucky. The court noted that only Kentucky had jurisdiction over appellant as a parolee. Illinois had jurisdiction over appellant's status as a parolee only as an agent of Kentucky parole officials. This decision is to be distinguished from *Jones v. Rayburn*,⁵⁰⁴ where the parolee was allowed to reside in another jurisdiction without statutory authorization.

⁵⁰⁴ 346 S.W.2d 743 (Ky. 1961).

XIII. PROPERTY

A. WILLS

We are presented with three cases in which wills have been attacked on the basis of lack of mental capacity and undue influence. The cases are very similar, with the first of them, *Roland v. Eibeck*,⁵⁰⁵ being cited in the two subsequent cases. In the *Roland* case, the deceased, Mrs. Eadie Eibeck, had led an active life up until her last years, when she was unable to walk and required assistance in being moved. During the period from 1958 until 1960, she had lived with one of her sons, Johnnie, in a home on her farm. Prior to that time, in 1957, she had written a will and deposited it with the county court clerk. In 1960, Mrs. Eibeck moved to the home of her daughter and son-in-law, Mr. and Mrs. Howard Roland, and continued to reside there until her death in September of 1961. Shortly after moving in with her daughter, Mrs. Eibeck withdrew her 1957 will, and on October 15, 1960, executed the will in question. The lower court found that the will should be held invalid and the case appeared before this court on appeal.

In regard to the evidence, the Court of Appeals stated that the testimony given by the witnesses appearing in support of the will was much the superior evidence on the issue of mental capacity. It stated that it was made distinctly aware of the possibility that the jury usurped Mrs. Eibeck's right to make a will. However, the court went on to cite *Hines v. Price*⁵⁰⁶ where it was held that: "As undue influence is peculiarly a question for the jury, this court has been reluctant to upset the finding of the jury where there is more than a scintilla of evidence to support it."

Thus the court upheld the long established rule of supporting a jury's conclusion, unless it be completely unfounded.

In addition to the preceding point, the court cited further from the *Hines* case and stated: "When a contest is pitched on both mental incapacity and undue influence, evidence that tends to show both need not be as convincing as would be essential to prove one or the other alone."

This case was affirmed in regard to the wills question, and reversed on a question involving an answer given by a juror on voir dire.

The other two cases involving substantially the same points as *Roland*, were *Blankenship v. Blankenship*⁵⁰⁷ and *Ward v. Norton*.⁵⁰⁸

⁵⁰⁵ 385 S.W.2d 37 (Ky. 1965).

⁵⁰⁶ 310 Ky. 758, 221 S.W.2d 673 (1949).

⁵⁰⁷ 389 S.W.2d 933 (Ky. 1965).

⁵⁰⁸ 385 S.W.2d 193 (Ky. 1965).

Both of these cases essentially reaffirmed the *Roland* case in regard to (1) will contests being peculiarly a question for the jury, and (2) that amount of evidence necessary when mental incapacity and undue influence are both involved, being less than that needed if either is alleged alone.

In *Tapp v. Reynolds*,⁵⁰⁹ there was a joint will made by husband and wife. This was an action wherein legatees under the spouses' joint will sought judgment declaring their rights against the executor of the estate of the spouse who had survived his wife and thereafter revoked the joint will. The will stated in the first clause that each spouse wills to the other for life, with power of encroachment for living expenses, all of his or her estate and in the fourth clause stated that the wife alone wills 2,000 dollars to a beneficiary in trust for her education. The court held that the bequest took effect immediately upon the wife's death and it was to take precedence over the general bequest of all her property to the husband for life. In addition, the court said that it was of no significance whether the husband had the right to revoke the joint will as to his estate. The beneficiary was considered to take from the wife's estate.

Moving from the more clearly defined areas of law found in the previous cases, we now encounter *Fairweather v. Nord*.⁵¹⁰ In *Fairweather*, the deceased had used as a will a form to which he had added or filled in words in his own handwriting. The court held that an instrument which contained both printed words and words handwritten by the decedent was sufficient as a holographic will where the printed words were surplusage. In reaching this decision, the court cited the Kentucky case of *Blankenship v. Blankenship*⁵¹¹ which had struck down an attempt at a holographic will. But in so doing, the court in *Blankenship* had stated: "The instrument itself may still properly be said to be wholly written by the testator where the intent is clear and the instrument is complete in itself."

The court was of the opinion that the printed words were surplusage and that the written portion, without the printed words, was sufficient to constitute a testamentary disposition of all her property.

Page, in his treatise on wills states in regard to this problem:⁵¹²

Whether the printed portion of a blank on which testamentary provisions have been filled in, in the handwriting of the testator, may be rejected if the printed provisions are complete in themselves, is a question upon which there is conflict of authority. . . . It is generally held

⁵⁰⁹ 383 S.W.2d 334 (Ky. 1965).

⁵¹⁰ 388 S.W.2d 122 (Ky. 1965).

⁵¹¹ 276 Ky. 707, 124 S.W.2d 1060 (1939).

⁵¹² II Page, Law of Wills § 20.5 (1960).

that the filling in of spaces on a blank will form is insufficient to be valid under a statute requiring that the will must be entirely in the testator's handwriting. . . . However, the key is in the wording of the statute —i.e., must be entirely in the handwriting of the testator.

Going to the Kentucky Statutes,⁵¹³ we find the wording "wholly in writing" which would seem to indicate that Kentucky's court has made hash of the statute. But since there are only nineteen states which allow holographic wills, it is hard to state how Kentucky stands in regard to a majority of states. It would seem that where it is relatively clear what a person's intent was, and there is no chance for fraud, a man's wishes as to the disposition of his accumulations should be given cognizance whenever possible.

B. FUTURE INTERESTS

Perhaps the most logical point of entry when dealing with future interests is with a case involving the rule against perpetuities. *Mounts v. Roberts*,⁵¹⁴ as decided by the court, is such a case. It is this writer's contention, however, that the case was decided incorrectly, and that there actually is no violation of the rule. The problem arises out of a deed of conveyance from Anderson Mounts to his wife, Rebecca. According to the terms of the deed, the property was to go to Rebecca so long as she remained the wife or widow of the said Anderson Mounts. After her death or re-marriage, the property was to convert to her "lawful male" children by Anderson Mounts and after the death of the male children, then said land was to convert to their lawful heirs. The court construed these provisions as creating life estates in both the wife Rebecca, and the male children by Anderson Mounts. This should not be the case. When the deed provided that after the death of the male children the land was to go to their lawful heirs, it was simply re-iterating the normal disposition of land as follows the death of one who owns a fee in property. The male children owned a fee in the land and at their death, the land would go to their lawful heirs. This plainly creates a fee subject to partial divestment in the seven male children alive at the time of the deed, and not a life estate. This is even more true when you consider the decision in light of the settled rule that you will construe a fee simple rather than a lessor estate whenever the language is ambiguous.

But, for the sake of discussion, let us assume a life estate in the male children. The court goes on to say that the deed violates the rule against perpetuities, since after the successive life estates the

⁵¹³ KRS 394.040.

⁵¹⁴ 388 S.W.2d 117 (Ky. 1965).

remainder would go to the heirs of the sons, some of whom could be "born" more than twenty-one years and ten months after the death of persons living when the deed was executed. This, of course, is an incorrect statement of why the rule would be violated. It is of no consequence when an heir might be born. Rather, it is the fact that a child might be born of one not a life in being at the time of the deed, that causes the violation.

It would thus seem that the case was incorrectly decided on two counts. However, a proper interpretation of a fee simple instead of a life estate in the male children would have rendered the second interpretation question moot.

*McGiboney v. Board of Educ. of Middlesboro*⁵¹⁵ presented an opportunity for the court to reaffirm a principle of law that they had stated earlier in *Holbrook v. Board of Educ.*⁵¹⁶ In the *Holbrook* case the court said: "The law does not favor forfeitures and a deed will not be construed to create a conditional estate unless the language clearly evidences such an intent." The *McGiboney* case involved a successor in title to a grantor bringing action to quiet title to realty. The original deed recited consideration of six hundred dollars and provided that the grantee erect a school building within two years or the realty should revert to the grantor and the sum of six hundred dollars be repaid to the grantee. The plaintiff claimed a determinable fee where title would automatically revert to the grantor without necessity of re-entry. The court held that no determinable fee existed. Instead, the deed merely provided that the grantor may buy back the property by returning the consideration. The court held that had it not been for that provision, the deed clearly would have created a determinable fee.

The last two cases in this area of future interest deal with the vesting of interests. The first of these is *Ashland Oil & Ref. Co. v. Rice*.⁵¹⁷ In that case there was a will devising the residue of an estate to the testator's wife for life. At her death the estate was to go to three named children and in the event any of the children should die without issue then to the heirs of the testator's body. All three of the children outlived the wife. This was an action to determine whether the language of the will meant that the interests vested at the wife's death or when the three named children had issue. The court interpreted the instrument to mean the former. In so holding

⁵¹⁵ 387 S.W.2d 869 (Ky. 1965).

⁵¹⁶ 300 S.W.2d 566 (Ky. 1957).

⁵¹⁷ 383 S.W.2d 369 (Ky. 1965).

the court reaffirmed an earlier holding in *Atkinson v. Kern*,⁵¹⁸ where the court stated:

The rule applicable where there is an intervening life estate, and a gift over upon death of the remainderman without issue, is that the limitation with reference to death without issue is restricted to the death of the remainderman before the termination of the life estate.

The second case dealing with the vesting of an interest is *Graham v. Jones*.⁵¹⁹ There a well gave property to the testators wife for life and at her death to his nearest blood relative under the laws of the State of Kentucky. The case was decided following the generally accepted principle that the time of vesting of remainder interests is the date of the testator's death.⁵²⁰ The trial court, in deciding contra, relied on *White v. White*,⁵²¹ which held that nearest blood relatives indicated an intention to have the property pass to persons most directly proximate in degree of relationship. The Court of Appeals in reversing, held *White* distinguishable, stating the expression, nearest blood relative, when measured by the modifying phrase under the laws of the State of Kentucky must be held to relate to proportionate shares (i.e. per stirpes, not per capita) rather than immediate or mediate relatives as considered in *White*.

C. ESTATES

The first case, and a controversial one, which we shall consider under this section is *Givens v. Givens*.⁵²² One co-remainderman obtained a forty year lease on coal rights from the life tenant nine days before her death. This court held that the lease was valid since the life tenant had the power to encroach upon the corpus, despite the fact that the lease would result in depletion of the remainder of the estate. The court went on to say, however, that the same fiduciary relationship that exists between joint tenants and tenants in common applies to co-remainderman so that a single co-remainderman who acquires outstanding interest in the remainder acquires the interest for all co-remaindermen.

This case is of particular interest in regard to both points. To begin, the power of a life estate holder to give a lease which lasts beyond the period of the life estate is in the great minority in the United States. The only case the court could find in support was a

⁵¹⁸ 210 Ky. 824, 276 S.W. 977 (1925).

⁵¹⁹ 386 S.W.2d 271 (Ky. 1965).

⁵²⁰ *Stallard v. Lambert*, 236 Ky. 651, 335 S.W.2d 682 (1930).

⁵²¹ 365 S.W.2d 732 (Ky. 1962).

⁵²² 387 S.W.2d 851 (Ky. 1965).

1926 Missouri case of *Holland v. Bogardus-Hill Drug Co.*⁵²³ This writer was able to locate one other case of even earlier vintage, from Ohio, it being *O'Hara v. Perrano*.⁵²⁴ But as stated, this decision is rather desolate at this time.

Secondly, in regard to finding that there is a fiduciary relationship existing between co-remaindermen similar to that existing between co-tenants, while not being without support, is new in Kentucky and there are outside this state many cases both pro and con for the proposition.⁵²⁵ The main thing of importance, however, is that this is the first time this result has been reached in Kentucky. The reason for the courts having reached this decision would seem to be that the court's notion of justice prevailed over the lack of precedent.

In *Pendleton v. Strange*,⁵²⁶ the court was involved with proceedings to settle partnership affairs. The question involved was whether certain land belonged to the partnership or the deceased's heirs. In holding that the land was not to be included as partnership property, the court echoed what it had stated earlier in *Sandefur v. Gauters*⁵²⁷ "There is a presumption against including as partnership assets real estate owned by a partner which can be rebutted only by clear manifestation of partnership intent."

In *Ladd v. Overcast*⁵²⁸ the court interpreted chapter 413, section 210, of the Kentucky Revised Statutes. In that case there was a contract in which a debtor was to convey property to his creditor for the creditor to sell and apply proceeds to the debt. The agreement provided that in the event there was any surplusage, the creditor would hand it over to the debtor's family. This action was brought by the family of the debtor against the family of the creditor, for said surplusage, nine years, three months, and seven days after the date the action accrued. The court in interpreting the statute stated:

It is obvious that the Legislature intended to require creditors to bring their actions on claims against the heirs and devisees of a decedent jointly with decedent's personal representative, or against his heirs and devisees alone, within seven years of the death, if his personal representative has made final distribution and has been discharged.

The court denied recovery on the basis of this interpretation.

⁵²³ 314 Mo. 214, 284 S.W. 121 (1926).

⁵²⁴ 8 Ohio N.P., N.S., 581 (1903-1913).

⁵²⁵ See, e.g., *Wilson v. Linder*, 21 Idaho 576, 123 P. 487 (1912); *Harrison v. Harrison*, 56 Miss. 174 (1878). *Contra*, *Crawford v. Meis*, 123 Iowa 610, 99 N.W. 186 (1904); *Jinkiaway v. Ford*, 93 Kan. 797, 145 P. 885 (1915).

⁵²⁶ 381 S.W.2d 617 (Ky. 1965).

⁵²⁷ 259 S.W.2d 15 (Ky. 1953).

⁵²⁸ 386 S.W.2d 949 (Ky. 1965).

D. TRUSTS

In *Robertson v. Surgener*⁵²⁹ the original testator had left a life estate to his wife, and upon her death, the estate was to be held in trust for his grandson. This was an action between the grandson's widow and the heirs at law of the grandfather. The question was whether the testator intended to leave to the grandson a remainder in fee, subject to control by a trustee of expenditures during his lifetime, or intended only to leave to the grandson an equitable life estate. The court held that the grandson took a fee and the estate passed according to his will. The mere fact that the property was placed in the control of a trustee did not require that the devise be construed as creating only a life estate.⁵³⁰

*Curtis v. Citizens Bank & Trust Co.*⁵³¹ decided several issues pertaining to payment of trustees for services rendered. Most of these merely involved decisions on the evidence. One issue, however, is relevant as an interpretation of chapter 386, section 180, sub-section 1, of the Kentucky Revised Statutes, applying to the payment of trustees. The statute, in essence, states that the trustee may take a choice between an annual commission of one fifth of one per cent of the fair value of the real and personal estate, or in lieu of the commission, a commission which shall not exceed five per cent of principal, distributed, payable at the time the principal is distributed. The trustees had made their election of the latter method, presuming that they could take the entire five per cent. The court, however, decided that this was merely the maximum the trustee could take and the actual amount was to be decided on a basis of a reasonable fee under the facts of each particular case. In so doing they reaffirmed an earlier Kentucky decision of *Baker's Heirs v. Dixon Bank & Trust Co.*⁵³² In this particular case of *Baker's Heirs*, the court concluded that the bank was not entitled to the entire five per cent.

E. SAVINGS ACCOUNTS

In this section we will be dealing with two cases somewhat related in result, but not entirely in fact. In the first, *Saylor v. Saylor*,⁵³³ we are faced with an action for declaratory judgment to determine ownership of a bank savings account. In this case there was a passbook which was made out in the names of husband "or" wife. The decision

⁵²⁹ 386 S.W.2d 468 (Ky. 1965).

⁵³⁰ *Drye v. Cunningham Midley Co.*, 24 Ky. Law Rep. 2500, 74 S.W. 272 (1903).

⁵³¹ 384 S.W.2d 328 (Ky. 1965).

⁵³² 292 Ky. 701, 168 S.W.2d 24 (1943).

⁵³³ 389 S.W.2d 904 (Ky. 1965).

of this case was that such a situation raises a rebuttable presumption of intent that the balance on hand should become the property of the other party. The court went on to say that to the extent that this decision differed from their opinion in *Hays v. Hays' Adm'r*,⁵³⁴ the *Hays* case was to be considered overruled. The applicable point in *Hays*, was that a gift must be proven when the owner of money deposits it to a joint bank account. The court, in *Saylor v. Saylor*, in overruling that part of the *Hays* decision, held that the rebuttable presumption was based upon the fact that such a right gratuitously conferred on the other party is recognized and is enforceable on the theory of third party beneficiary contract law.

The second case in this section was *Hoffman v. Russell Fed. Sav. & Loan Ass'n*.⁵³⁵ This case is also an action to determine the rights to a joint savings account. The mother turned over 20,000 dollars to her son and in addition had repeatedly expressed the intention that he have the money. He had deposited the money in an account in both their names. The lower court, basing its decision on *Hays v. Hays*, found insufficient evidence to prove a gift. Of course, in regard to that part of the *Hays* opinion requiring proof of a gift, it had been overruled by the *Saylor* case. But, here, since Mrs. Hoffman did not participate in the creation of the account, the transfer to the son of the money could be upheld only on the gift theory. The Court of Appeals decided that there was enough evidence to justify the finding of a gift and so overruled.

F. OIL AND GAS

In *Collins v. Inland Gas Corp.*,⁵³⁶ we have a proceeding for the determination of proper distribution of royalties arising from two producing gas wells. The facts here are that forty acres of the parents' 200 acre tract were conveyed to each of five children with the parents retaining a life interest in the oil and gas. Upon the termination of the life estates, the owner of each tract succeeded in proportionate right to share in the royalties. The court held that a successor to three of the children's shares was entitled to three fifths of the royalties and the two other children's successor was entitled to two fifths of the royalties although all wells were located on the latter's property. In this area there are two main Kentucky cases. One is *McIntire's Adm'r v. Bond*.⁵³⁷ This case supports an apportionment of the royalties on an acreage basis, which would seem to be in harmony with the

⁵³⁴ 290 S.W.2d 795 (Ky. 1956).

⁵³⁵ 390 S.W.2d 644 (Ky. 1965).

⁵³⁶ 382 S.W.2d 194 (Ky. 1965).

⁵³⁷ 227 Ky. 607, 13 S.W.2d 772 (1929).

Collins case. The other case is *Hurst v. Paken Oil Co.*,⁵³⁸ which entitled each owner to the oil and gas royalties produced on his own tract. It is interesting to note that the *Hurst* case reached this seemingly opposite result from the *McIntire* case, and yet without expressly overruling *McIntire*. In order to avoid solving this contradiction, the court in the *Collins* case stated that rather than undertake a reconciliation of the *McIntire* and *Hurst* cases, they would instead seek a construction of the deeds looking toward determination of the intention of the grantors, and in so doing the court reached the result as indicated above.

Another case dealing with an oil and gas problem was *Salisbury v. Columbian Fuel Corp.*⁵³⁹ This was an action to establish the rights to free gas from a well. The lease involved provided that the lessor was to have gas free of cost from the well for all stoves and all inside lights in the principle dwellings on the land, and if the estate of either party was assigned, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns. The court held that the lease ran with the land instead of being personal. The rule is that a lease runs with the land unless language clearly creates a personal right. Here, a recitation in a conveyance, and repeated in a subsequent conveyance, in favor of a grantor, his heirs and assigns indicates a covenant running with the land. This case follows previous Kentucky law.⁵⁴⁰

G. MISCELLANEOUS

The first case in this section is *Blair v. City of Pikeville*⁵⁴¹ and deals with the use of easements. The defendant, through its contractor, constructed a sewer line over the plaintiffs property on its easement and damaged the plaintiffs property. The defendant claimed that the work was done without negligence, according to plans and specifications. The court held that the defendant was liable in absence of any showing that the plans and specifications were in furtherance of reasonable use of the easement. Reasonable use must be considered in light of existing use of the property by owners, i.e., demolition might be deemed necessary by the plans and specifications, but whether this would be reasonable use must be determined by other evidence. In short, the appellant need not be proven negligent in the construction. All the plaintiff must show is that the damage to his lot was not essential to fair use of the easement by the

⁵³⁸ 287 Ky. 257, 152 S.W.2d 981 (1941).

⁵³⁹ 387 S.W.2d 864 (Ky. 1965).

⁵⁴⁰ *Maynard v. Ratliff*, 297 Ky. 127, 179 S.W.2d 200 (1944).

⁵⁴¹ 384 S.W.2d 65 (Ky. 1965).

defendant. This decision adds to Kentucky law in that it now does not matter whether the damage was to an adjacent property owner or to property to which the tortfeasor had a right to use. Under either there would be a taking within the purview of section 242, of the Kentucky Constitution.

In *Hall v. Elk Horn Coal Corp.*,⁵⁴² a mining company subdivided and sold lots in a mining town and limited the use to residential purposes only. The company, at the time, operated a commissary and continued to do so for some time before leasing it to another. This was an action by the coal company to enforce by injunction the provisions in the deeds, relating to the restriction of use to residential purposes only. It was proposed that since the coal company had leased its land, it no longer had enough interest to enforce the restrictions. The court stated the fact that the defendant formerly operated a company commissary and now leases it out is not a sufficient change in conditions to affect the defendants right to enforce the restrictions in the deed, since the defendant still benefits.

Commonwealth, Dep't. of Highways v. Turner,⁵⁴³ was an action by landowners to quiet title to certain realty. The Commonwealth had acquired title from the plaintiffs to property for use as a highway, but had not built the highway. Plaintiffs sought return of title to the property claiming it to be abandoned. The court, in following *Turk v. Wilson's Heirs*,⁵⁴⁴ stated that title to real property in fee simple may not be divested except by writing or adverse possession. It cannot be abandoned.

Our last case, in this section, involves a failure to comply with chapter 355, section 9-402, of the Kentucky Revised Statutes, by not signing a recorded chattel mortgage, with a subsequent attaching creditor filing a lien. In *Alloway v. Stuart*⁵⁴⁵ the court held that since a financing statement merely serves notice of, and warning to, third parties that the creditor has some interest in the property which is in the physical possession of another, no potential creditor could fail to understand the mortgagee's position as debtor in view of the detailed nature of the chattel mortgage filed. The court continued to be indulgent of minor errors as lawyers educate themselves with the Uniform Commercial Code. In the transition period the Uniform Commercial Code has been liberally construed to prevent injustice caused by unfamiliarity.

⁵⁴² 386 S.W.2d 258 (Ky. 1965).

⁵⁴³ 386 S.W.2d 726 (Ky. 1965).

⁵⁴⁴ 266 Ky. 78, 98 S.W.2d 4 (1936).

⁵⁴⁵ 385 S.W.2d 41 (Ky. 1965).

XIV. TAXATION

*Harlan County Bd. of Supervisors v. Hill*⁵⁴⁶ holding that the circuit court of the county has jurisdiction to try and determine a tax appeal where the county board ruled on a tax assessment made by a county tax commissioner resolving what was thought to be a statutory ambiguity⁵⁴⁷ is of little value today in view of the statutory changes of procedure for appeal in tax assessment cases. It is now provided that one must protest first to the department of revenue in writing and then to the Kentucky Board of Tax Appeals.⁵⁴⁸ Then one may appeal within thirty days after the decision of the Kentucky Board of Tax Appeals except for appeals from the county board of supervisors to either the Franklin Circuit Court or to the circuit court of the county in which the aggrieved party resides or conducts his place of business. Appeals from the board of supervisors go to the circuit court of the county in which the appeal originated.⁵⁴⁹ Another case dealing with procedure of tax appeal is *Department of Conservation v. Co-De Coal Co.*⁵⁵⁰ There it was held that an independent action could not be maintained in the Franklin Circuit Court to compel the refund of taxes where the taxpayer had made no attempt to follow the prescribed procedure for review of a decision of the department of revenue.⁵⁵¹

A state tax of ten cents per proof gallon was held to be collectable from a manufacturer of whiskey who had contracted to manufacture whiskey for a Mexican customer in absence of a showing that the whiskey could be produced and manufactured within the physical boundary and confines of a class six United States Customs Bonded Manufacturing Warehouse. The court did not feel that the whiskey would be committed to the export stream until placed in a class six bonded warehouse.⁵⁵²

It was determined in *Kentucky Tax Comm'n v. Jefferson Motel, Inc.*⁵⁵³ that a leasehold interest, even though a contract right, may be subject to an *ad valorem* tax where the lessor is tax-exempt. This is to be distinguished from the case of a non-exempt lessor. In that instance the fee and the leasehold interest can not be separated because there the lessor passes the tax on to the lessee through the rental

⁵⁴⁶ 382 S.W.2d 859 (Ky. 1964).

⁵⁴⁷ KRS 131.120(1) and 133.120(4).

⁵⁴⁸ KRS 131.110.

⁵⁴⁹ KRS 131.370.

⁵⁵⁰ 388 S.W.2d 614 (Ky. 1965).

⁵⁵¹ KRS 134.580, 131.110 and 131.120.

⁵⁵² *Department of Revenue v. Stitzel-Weller Distillery*, 387 S.W.2d 602 (Ky. 1964).

⁵⁵³ 387 S.W.2d 293 (Ky. 1965).

rate.⁵⁵⁴ The tax as to this particular lessee though was held to be discriminatory because he was assessed on the basis of the leasehold whereas the prevailing way of assessment was to assess on the value of the improvements.

⁵⁵⁴ Fayette County Bd. of Supervisors v. O'Rear, 275 S.W.2d 577 (Ky. 1955).

XV. TORTS

A. AUTOMOBILE LITIGATION

The law concerning tort actions involving automobiles was little affected by the decisions of the court during the past term. Although some changes were made, the court's primary accomplishment was the clarification of existing law.

The law concerning negligence of an automobile operator who loses control of his car on a slippery road, thereby causing an accident, was far from clear prior to the decision in *Jones v. Carr*.⁵⁵⁵ The comprehensive and detailed opinion rendered in that case clarified the existing law to a great extent. The issue in the *Jones* case was whether the alleged negligence of a motorist who, knowing the hazardous condition of the highway, lost control of his automobile was a question for the jury or could be decided as a matter of law by the court. The Court of Appeals held that it was a question for the jury, and quoted the following language from *Tente v. Jaglowicz*⁵⁵⁶ as "eminently sound law."⁵⁵⁷

But it cannot be held as a matter of law that the operator of a car is necessarily negligent when the car skids or slides on an icy street. The proper inferences from that fact are to be drawn by the jury. . . . In this case, the sliding of the car was explained by the slippery condition of the street, and it was for the jury to say whether it was superinduced or accelerated by the negligence of the driver.⁵⁵⁸

In the course of the opinion the court criticized, but did not overrule, two cases⁵⁵⁹ which had held *as a matter of law* that one driver was, and the other was not, negligent, under similar circumstances, solely on the basis of the speed of their vehicles at the time of the skid. The court held that there is no hard and fast rule fixing the speed at which a slippery road becomes dangerous for travel. Usually a skid is the result of a combination of many factors, and all must be considered. The court did make clear, however, that the act of skidding itself, under known natural hazardous conditions which results in injury to others, constitutes *circumstantial evidence* of negligence.

In a closely related case, *Sloan v. Iverson*,⁵⁶⁰ the court stated that:

Under the principles enunciated in *Jones v. Carr*, Ky., 382 S.W.2d 853, there clearly is no merit in Sloan's contention that, because of the evi-

⁵⁵⁵ 382 S.W.2d 853 (Ky. 1964).

⁵⁵⁶ 241 Ky. 720, 44 S.W.2d 845 (1931).

⁵⁵⁷ 382 S.W.2d at 855.

⁵⁵⁸ 241 Ky. at 725, 44 S.W.2d at 847.

⁵⁵⁹ *Atlantic Greyhound Corp. v. Franklin*, 301 Ky. 867, 192 S.W.2d 753 (1946); *Risen v. Consolidated Coach Corp.*, 274 Ky. 342, 118 S.W.2d 712 (1938).

⁵⁶⁰ 385 S.W.2d 178 (Ky. 1964).

dence that his car skidded into the other, he is entitled to a directed verdict. . . .⁵⁶¹

Under the authority of the *Jones* and *Sloan* cases, it may be concluded that it will be more difficult to obtain a directed verdict against the motorist on the theory that the skidding, in itself, is *prima facie* proof of negligence. On the other hand, it will also be very difficult to obtain a directed verdict in favor of the motorist on the theory that the skid was unavoidable, which would completely absolve the driver of any negligence. It will take a very clear case for the court to find negligence, or lack of same, as a matter of law in this type situation, and the surrounding circumstances other than the skidding alone will have to be considered.

The *Sloan* case, also involves the question of whether an unavoidable accident or sudden emergency instruction should have been given where the driver, who knew of the hazardous condition, swerved sharply to miss an oncoming vehicle and then slid into it. The court not only held that the instruction should not be given, but went on to say that "actually we entertain serious doubt whether an unavoidable accident instruction should ever be given in an automobile collision case."⁵⁶² However, the court held in *Van Hoose v. Bryant*⁵⁶³ that an unavoidable accident instruction was proper where there was testimony to the effect that just before a head-on collision, two automobiles, one in each line, were bearing down upon defendant's automobile, resulting in a collision.

In *Collett v. Taylor*,⁵⁶⁴ plaintiff attempted to make a left turn when he was hit by defendant who had started to pass. Defendant denied plaintiff's contention that he signalled, and plaintiff denied defendant's contention that he sounded his horn. The defendant moved for a directed verdict under the authority of two prior cases,⁵⁶⁵ which held negative evidence presented by a witness to the effect that they did not hear a sound signal, was not sufficient to present a jury question against positive testimony that such a signal was given. The court overruled the above two cases, and laid down the following rule:

Whether a jury issue is presented by so-called "negative" testimony must depend on the facts of the particular case; including the preponderance of the positive evidence; the likelihood that the witness or witnesses,

⁵⁶¹ *Id.* at 178.

⁵⁶² *Id.* at 179.

⁵⁶³ 389 S.W.2d 457 (Ky. 1964).

⁵⁶⁴ 383 S.W.2d 692 (Ky. 1964).

⁵⁶⁵ *Louisville & Nashville R.R. v. Galloway's Adm'rx*, 267 S.W.2d 90 (Ky. 1954); *Chesapeake & Ohio Ry. v. Burke's Adm'rx*, 299 Ky. 851, 187 S.W.2d 295 (1945).

giving the negative evidence, would have heard and noticed the signal, had it been given; and the interest or disinterest of the respective witnesses.⁵⁶⁶

In *Railway Express Agency, Inc. v. Warfield*,⁵⁶⁷ plaintiff attempted to pass defendant and a collision ensued when plaintiff started to pull back into the right lane. Each contended the other swerved into him. The court sustained a verdict for the plaintiff, even though the testimony of the only witness corroborated defendant's story that he had come to a stop with his right wheels a foot or two off the side of the road, and even though broken glass and debris were found in the right hand lane. The court stated that "the debris in the road, and the testimony of disinterested eyewitness are not conclusive."⁵⁶⁸ Physical evidence, such as the position of debris in the highway, is a less probative circumstance than tire marks, which may be held conclusive.⁵⁶⁹ The court went on to say that even if it were assumed that the passing automobile was to the right of the center line it would not have been negligence, since KRS 189.340(1) only requires the overtaking vehicle to pass to the left, the operators of both vehicles having a duty of "reciprocal assistance" in so doing.

Two interesting opinions were handed down by the Court of Appeals concerning automobile and train collisions. In the first case, *Gibson v. Louisville & Nashville R.R. Co.*,⁵⁷⁰ the plaintiff's vision was obscured by a cloud of dust caused by another automobile. The lead automobile noticed the train, and swerved off the road in time to avoid a collision, but, due to the limited vision caused by the cloud of dust, plaintiff's vehicle was unable to avoid the train. The only warning sign in the immediate vicinity was located on the other side of the track from the plaintiff and was therefore, not visible to him. The court held the railroad was not negligent for two reasons: the train occupying the crossing was an adequate warning in itself, and the fact that the automobile preceding plaintiff observed the train in time to avoid the accident established that the obstructed vision, not defendant's negligence, was the primary cause of the accident.

In *Blair v. Louisville & Nashville R.R. Co.*,⁵⁷¹ the engineer of the train, who was injured when defendant's truck collided with the train, brought suit against the estate of the deceased truck driver on the theory that there is strict liability on the part of a driver who runs into the side of a moving train. The court rejected the appellant's

⁵⁶⁶ 383 S.W.2d 692, at 695.

⁵⁶⁷ 386 S.W.2d 453 (Ky. 1965).

⁵⁶⁸ *Id.* at 454.

⁵⁶⁹ *Thornberry v. Smith*, 346 S.W.2d 727 (Ky. 1961).

⁵⁷⁰ 382 S.W.2d 568 (Ky. 1964).

⁵⁷¹ 390 S.W.2d 178 (Ky. 1965).

strict liability theory on the ground that, since the train and the truck arrived at the crossing simultaneously, the train could not have constituted notice in itself as it did in the *Gibson* case.

Two cases were considered by the Court of Appeals concerning contributory negligence of infant pedestrians, who were struck by automobiles while attempting to cross streets at places other than a crosswalk or intersection. In *Couch v. Holland*,⁵⁷² the court held that a fourteen year old pedestrian, who walked blindly into the path of a moving vehicle, was contributorily negligent as a matter of law for failing to exercise that standard of ordinary care which could be expected of a normal child of her age, experience, and intelligence. The second case, *Willoughby v. Stiltz*,⁵⁷³ is more complex. An epileptic, nine year-old boy ran against a red light into a street beyond a crosswalk at a busy intersection where he was struck by an automobile. The court held that since there was testimony to the effect that this particular child had been taught the safety rules to be followed by pedestrians and that he had responded well to this advice, he could be held responsible for his negligent acts as a matter of law. This is a close case, because there is a well settled rule in tort law that there is a rebuttable presumption that a child between the ages of seven and fourteen can not be guilty of negligence, and the court recognized it as such in the opinion. Yet, the court held that safety instructions from his teacher and mother, coupled with the fact that he was of average intelligence and discretion, was sufficient to rebut the presumption against his negligence. Is it not arguable that every average intelligent nine year old child has been instructed as to safety precautions followed by pedestrians? If this is all that is needed to rebut the presumption, the rule, at least in this particular situation, has very little weight.

B. OTHER DECISIONS

The important decisions in other areas of tort law this year can be placed in four distinct categories: (1) libel and slander; (2) municipal immunity; (3) contribution and indemnity between co-defendants; and (4) relevancy of a company's safety rules to a negligence action.

1. Libel and Slander

There were two cases in this area last term, and they both involved an application of the recent Supreme Court case of *New York Times Co. v. Sullivan*.⁵⁷⁴

⁵⁷² 385 S.W.2d 204 (Ky. 1964).

⁵⁷³ 387 S.W.2d 10 (Ky. 1965).

⁵⁷⁴ 376 U.S. 254 (1964).

The first of these two cases was *Tucker v. Kilgore*,⁵⁷⁵ a libel action brought by a Louisville city police officer against a local civil rights worker named Bishop Tucker. A fraternity was holding its annual national convention in a Louisville hotel. Kilgore, the police officer, and also a member of the fraternity, had been assigned to duty at the hotel by the police department. Bishop Tucker came to the hotel and entered a room where one of the meetings of the organization was taking place. Not being a member, Bishop Tucker was asked to leave. When he refused, Kilgore, who had been summoned, escorted Tucker from the hotel.

Kilgore's complaint had as its basis about 2,000 copies of a handbill which Bishop Tucker distributed a week or so later. These handbills ridiculed the members of the fraternity and said it "operates on the theory of the exclusion of what they term the 'common people.'"⁵⁷⁶ The handbills made more specific mention of Kilgore:

Among them Robert Kilgore—of limited training, no culture and a professional moocher, who strikes you for 50 cents or a dollar every time he meets you on the streets. This man was used in an attempt to embarrass me at the . . . [hotel]—without justification or warrant of law—illegally using his temporary authority as a policeman, and acting at the behest of his masters—in this phony race organization. I asked him to arrest me but he did not have the nerve to do so.⁵⁷⁷

One of the issues Bishop Tucker raised on appeal concerned the first amendment of the United States Constitution, which was held in *New York Times v. Sullivan*⁵⁷⁸ to require proof of actual malice before a state may award damages for libel in actions brought by public officials against critics of their official conduct. The Court of Appeals had this to say about Kilgore's "official conduct":

That Kilgore was a policeman, however, was no more than a coincidental circumstance in the attack made upon him by the bishop. That attack was directed not at Kilgore's official conduct as a policeman, but at his fitness and character as a man, exemplifying the low quality of . . . [the fraternity], the real object of the tirade. It is obvious from the contents of the pamphlet that it was not aimed at governmental oppression. Its object was to vilify a rival organization, and this purely personal attack on Kilgore was a handy means to that end. The freedom of "uninhibited, robust, and wide-open" debate on public issues guaranteed by the First Amendment cannot sensibly be turned into an open season to shoot down the good name of any man who happens to be a public servant.⁵⁷⁹

⁵⁷⁵ 388 S.W.2d 112 (Ky. 1964).

⁵⁷⁶ *Id.* at 114.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ 376 U.S. 254 (1964).

⁵⁷⁹ 388 S.W.2d 112, at 116.

The second libel case, *Wells v. Morton*,⁵⁸⁰ involves the question whether the Supreme Court's decision in *New York Times v. Sullivan*⁵⁸¹ changed the form or content requirement of the complaint in a libel action under Kentucky's Rules of Civil Procedure. In *Wells*, plaintiff sued for 100,000 dollars in damages arising from statements made in the newspaper which plaintiff claimed were libelous. The lower court dismissed plaintiff's complaint as amended for failure to state facts showing that he was entitled to relief, and plaintiff appealed the lower court's order.

The Court of Appeals reversed the judgment dismissing plaintiff's complaint, holding that *New York Times Co. v. Sullivan*⁵⁸² does not require the plaintiff in a libel action to allege actual malice in his complaint. The Court of Appeals noted that at no place in the *New York Times Case* "did the court pass on the sufficiency of the pleadings in the case; hence, the statement in appellee's brief to the effect that 'actual malice' must be alleged is erroneous."⁵⁸³ Thus the "actual malice" required in the *New York Times Case* need only be proved in court, not alleged in the pleadings.

2. Municipal Immunity

The Court of Appeals held in *Stephenson v. Louisville & Jefferson County Bd. of Health*⁵⁸⁴ that the Board of Health, created by KRS 212.350, is a municipal corporation, placing it squarely under the recent decision of *Haney v. City of Lexington*,⁵⁸⁵ in which the Court of Appeals repudiated the doctrine of governmental immunity as it applied to municipal corporations. The lower court in *Stephenson* had dismissed plaintiff's complaint on the ground that defendant Board of Health was not suable for damages resulting from personal injuries plaintiff allegedly suffered while undergoing treatment in Louisville General Hospital (which had been transferred to the Board by KRS 212.360) as a paying patient.

The Board contended that KRS 67.186⁵⁸⁶ establishes the immunity of a county or county operated hospital. The Court of Appeals dismissed this argument by saying that this was not a suit against a county or a county operated hospital.

⁵⁸⁰ 388 S.W.2d 607 (Ky. 1965).

⁵⁸¹ 376 U.S. 254 (1964).

⁵⁸² *Ibid.*

⁵⁸³ 388 S.W.2d 607, at 609.

⁵⁸⁴ 389 S.W.2d 637 (Ky. 1965).

⁵⁸⁵ 386 S.W.2d 738 (Ky. 1964). See also, *Burton v. Somerset City Hosp.* 388 S.W.2d 134 (Ky. 1965).

⁵⁸⁶ KRS 67.186(3) provides in part:

This section shall not be construed as waiving the . . . immunity of the
(Continued on next page)

3. Contribution and Indemnity

In *Lexington County Club v. Stevenson*⁵⁸⁷ the Court of Appeals commented on the sharp distinction between contribution and indemnity, two concepts which in the past may have caused confusion because of intermingling of the terms:

The theory of *contribution* is that a party required to pay more than his pro rata share of a common liability to an injured party has a right of recovery for one-half the amount paid against a joint tortfeasor in *pari delicto*, that is, one equally at fault from the standpoint of concurrent negligence of substantially the same character. [Citations omitted.] On the other hand, a right to total *indemnity* may exist if the joint tortfeasors are not in *pari delicto* and the party *secondarily* negligent asserts a claim against the one *primarily* negligent. [Citations omitted.]⁵⁸⁸

4. Safety Rules

In *Felix v. Stavis*,⁵⁸⁹ the Court of Appeals was asked to decide whether it was error for the lower court to direct a verdict for defendant due to plaintiff's contributory negligence. Plaintiff was loading defendant's trailer with a forklift; when the plaintiff backed the forklift out of the trailer, the truck lurched forward, causing the forklift to fall to the ground, and pinning plaintiff against a wall. Plaintiff died of his injuries. Plaintiff was employed by Westinghouse. Westinghouse had a printed safety regulation warning its forklift operators to chock the wheels of any truck before driving the lift into it. The wheels of defendant's truck were not chocked. Defendant hinted in its brief that plaintiff's failure to heed Westinghouse's safety regulation made him contributorily negligent as a matter of law. The Court of Appeals said:

It is our opinion that Westinghouse's safety regulation cannot be accorded the statute [sic] of an *absolute* standard of care, such as a statute, the violation of which would convict an employee ipso facto of a failure to exercise ordinary care even in respect to his relationships with strangers. However, we believe the regulation at the least has the effect of a warning, the existence of which is a circumstance to be considered in determining whether under all the circumstances the employee exercised the care of an ordinary prudent man. [Citation omitted.]⁵⁸⁹

(Footnotes continued from preceding page)

county or county operated hospital from suit only to the extent of the policy limits, and in judgment may be enforced or collected against the county, fiscal court, the members thereof, or such hospital, but shall only measure the liability of the insurance carrier [authorized in KRS 67.186(1)].

⁵⁸⁷ 390 S.W.2d 137 (Ky. 1965).

⁵⁸⁸ *Id.* at 143.

⁵⁸⁹ 385 S.W.2d 72 (Ky. 1964).

⁵⁹⁰ *Id.* at 75.

In *Current v. Columbia Gas of Ky.*,⁵⁹¹ the Court of Appeals held that it was error for the lower court to grant judgment as if a motion for a directed verdict had been sustained when the jury failed to reach a verdict, because the question whether defendant negligently lit an improperly vented space heater, causing injuries to plaintiff, was properly one for the jury.

The appellants sought to introduce in evidence the safety rules of appellee gas company relating to standards of care as to inspection and venting of gas appliances. The Court of Appeals had given apparently conflicting decisions on this point.⁵⁹² Holding that the rules

in this case were admissible, the Court of Appeals said:

In the instant case it is shown that the rules were effective before and at the pertinent periods in the case; the rules were known to the appellee's employees, and, in substance, the employees testified that the same conduct prescribed by the rules constitutes safe practice. There is no showing that any requirement of the rules exceeds the standard of ordinary care under similar circumstances. Clearly the rules related to the situation at bar, and were evolved for safety purposes. Under these circumstances we decide the instant rules should have been admitted. To the extent, and only to the extent, that the contra Kentucky cited the care of an ordinary prudent man. [Citation omitted.]⁵⁹³

⁵⁹¹ 383 S.W.2d 139 (Ky. 1964).

⁵⁹² For admissibility: *Louisville & Nashville R.R. v. Gregory*, 130 S.W.2d 745 (Ky. 1939); *Southern R.R. Co. v. Adkin's Adm'r.*, 117 S.W. 321 (Ky. 1909). Opposed to admissibility: *Louisville & Nashville R.R. Co. v. Stidham's Adm'r.*, 218 S.W. 460 (Ky. 1920); *Louisville & Nashville R.R. Co. v. Vaughan's Adm'r.*, 210 S.W. 938 (Ky. 1919); *Louisville & Nashville R.R. Co. v. Byer*, 153 S.W. 194 (Ky. 1913); *Southern R.R. Co. v. Stewart*, 132 S.W. 435 (Ky. 1910); *Louisville R.R. Co. v. Gaugh*, 118 S.W. 276 (Ky. 1909).

⁵⁹³ 383 S.W.2d 139, at 143.

XVI. UNEMPLOYMENT COMPENSATION

KRS 341.360(1) provides that employes on strike or engaged in a bona fide labor dispute are not eligible for unemployment compensation benefits, but it also provides that a lockout is not considered to be a strike or dispute for the purposes of unemployment compensation. In the past year there have been two cases in Kentucky concerned with the question of whether a labor dispute was to be properly called a strike or a lockout. In the first of these cases⁵⁹⁴ the bargaining agreement authorized termination on sixty days notice and the employer gave notice that two months thereafter "the following contract will be in effect." The employes refused to report for work. Although it would be deemed a "lockout" if the employer on termination of the contract announced that he would not continue to furnish employment unless the employes agreed to a contract with a fixed period of duration, here there was some ambiguity in the notice, despite the fact that the notice sounded very much like an ultimatum. "It was incumbent upon the employes to test out the situation by offering to continue work on the new terms under a reservation of the right to negotiate for a new fixed-term contract."⁵⁹⁵ Consequently, this was held to be a strike. In the second case⁵⁹⁶ the notice also contained an offer to meet with the union representative, recognition of employes' rights to belong to a union, a proposal of certain provisions for the new agreement, and an offer of continued employment under terms and conditions to be worked out under the new agreement if none were forthcoming from negotiations before the old contract expired. It would seem that a fortiori this would be a strike, and it was held to be.

It is provided by statute that when a worker has left voluntarily without good cause his most recent suitable employment, he is to be denied unemployment insurance benefits.⁵⁹⁷ In a recent case it was decided that if a worker were compelled to retire at sixty-five under a worker-approved retirement plan, which had been adopted by the company, on acquiescence of a workers' committee two years before the worker's retirement, such worker when retired at age sixty-five did not leave work "voluntarily" under KRS 341.370(2)(c).⁵⁹⁸ In

⁵⁹⁴ D. J. B. Collieries Co. v. Kentucky Unemployment Ins. Comm'n, 385 S.W.2d 772 (Ky. 1965).

⁵⁹⁵ *Id.* at 775.

⁵⁹⁶ Kentucky Unemployment Ins. Comm'n. v. South-East Coal Co., 389 S.W.2d 929 (Ky. 1965).

⁵⁹⁷ KRS 341.370(2)(c).

⁵⁹⁸ Kentucky Unemployment Ins. Comm'n. v. Young, 389 S.W.2d 451 (Ky. 1965).

doing so two cases had to be distinguished. *Kentucky Unemployment Ins. Comm'n. v. Reynolds Metal Co.*⁵⁹⁹ was distinguished on the basis that the employes were represented by a union under collective bargaining, and there was a pension plan. *Kentucky Unemployment Ins. Comm'n. v. Kroehler Mfg. Co.*⁶⁰⁰ was distinguished on the basis that the employee had a privilege of applying to the company for permission to continue work. Both distinctions seem tenable.

⁵⁹⁹ 360 S.W.2d 746 (Ky. 1962).

⁶⁰⁰ 352 S.W.2d 212 (Ky. 1961).

XVII. WORKMEN'S COMPENSATION

The most significant decision of the Court of Appeals this term in the area of workmen's compensation was the case of *Corken v. Corken Steel Prods. Inc.*⁶⁰¹ In that case the court held that, where a salesman was deliberately shot and killed by a stranger, acting without provocation, when, after the salesman had taken a lunch break, he attempted to get back into his automobile to make further calls on his customers, the death of the salesman arose out of his employment.

The court overruled the case of *Lexington Ry. Sys. v. True*,⁶⁰² in which it had held that the death of a street car motorman who was struck by a stray bullet did not arise out of his employment because this was not a hazard peculiar to the streets, thus not within the "street risks" doctrine. Although the court could have reached the same result in the principal case by overruling *True* on narrower grounds, and holding that the hazard of being shot by a madman or by a stray bullet is within the "street risks" doctrine, it apparently chose instead to adopt the "positional risk" doctrine as evidenced by the following language: Corken's employment was the reason for his presence at what turned out to be a place of danger, and except for his presence there he would not have been killed. Hence, it is our opinion that his death arose out of his employment.⁶⁰³

The court further stated that, in order for the death or injury to "arise out of" the employment, "casual connection is sufficient if the exposure results from the employment,"⁶⁰⁴ and that it is not necessary that the death or injury be "incidental, or the hazard peculiar, to the nature of the employment."⁶⁰⁵

The "positional risk" doctrine regards an injury or death as "arising out of" the employment whenever the employment brings the employee to the spot where he was injured or killed. Thus, if the court continues to apply the "positional risk" theory, it has, in effect, done away with the "arising out of" requirement—that is, if the injury or death occurs "in the course of" employment, then it "arose out of" the employment. However, the "positional risk" test is generally considered to be applicable only where the risk which causes the accident is "neutral"—that is, when it is peculiar neither to the employment nor to the employee.⁶⁰⁶

⁶⁰¹ 385 S.W.2d 949 (Ky. 1964).

⁶⁰² 276 Ky. 446, 124 S.W.2d 467 (1939).

⁶⁰³ *Corken v. Corken Steel Prods. Inc.*, 385 S.W.2d 949, 950 (Ky. 1964).

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ Malone & Plant, *Workmen's Compensation* 215 (1963).

Another case which involved a "course of employment" problem was *United States Fid. & Guar. Co. v. Easley*.⁶⁰⁷ Deceased, who was a salesman engaged on a profit-sharing basis, had no expense allowance, regular schedule, or working hours. Although he frequently reported into the office in the morning to pick up the names of prospects he had no regularly assigned office or other duties. On the date in question, deceased was in the employer's office early in the morning, and killed in an automobile accident between 4:30 and 5:00 o'clock p.m., approximately forty-five miles from his employer's office. Although the accident occurred within his extensive sales area there was no evidence as to his destination when the accident occurred. The Court of Appeals held that the evidence was not sufficient to support the Board's finding that the death arose out of and in the course of the salesman's employment. The court pointed out that since deceased had no regular working hours there was no reason to infer that the trip was for business purposes, and, accordingly, the court held that claimant had failed to sustain the burden of showing that the death arose out of and in course of deceased's employment.

In *Ratliff v. Epling*⁶⁰⁸ the court held that the death of a coal miner as a result of a cave-in, which occurred approximately one-half hour after he quit work, while he was gathering loose coal for his personal use on premises adjoining those of his employer but which were leased to another mining company, did not arise out of and in course of employment. The opinion observed that the accident occurred (1) a substantial time after the employer had quit work; (2) on premises which were wholly unconnected with the place of employment; and (3) while the employer was engaged upon an enterprise unrelated to his work. This case would appear to be merely a restatement of existing law.⁶⁰⁹

Another case in which the court held that an employee's death did not arise out of his employment was *Whitehouse v. R. R. Dawson Bridge Co.*⁶¹⁰ The foreman dismissed the construction crew for the day, but told deceased to wait at the construction site to assist a mechanic who would arrive later. While waiting, deceased jumped into a flooded creek and attempted to ride a large log, which tipped him into the water, resulting in his death. In sustaining the Board's order denying compensation, the court stated that the facts established that deceased was not performing, or about to perform, any

⁶⁰⁷ 385 S.W.2d 215 (Ky. 1964).

⁶⁰⁸ 384 S.W.2d 508 (Ky. 1964).

⁶⁰⁹ *Harbison-Walker Refractories Co. v. Brown*, 296 Ky. 629, 178 S.W.2d 39 (1944).

⁶¹⁰ 382 S.W.2d 77 (Ky. 1964).

duties for his employer when he drowned, but that instead he had departed from his employment to such an extent that compensation was precluded.

Five cases⁶¹¹ decided by the Court of Appeals this last term restated the well established rule⁶¹² that in workmen's compensation cases the court does not have the power to weigh the evidence or pass anew upon the board's finding of fact where the finding is supported by substantial evidence. However, this rule is based on KRS 342.285 as it stood before the 1964 amendment, and, although none of the workmen's compensation cases decided this term arose after the amendment became effective, it might be worthwhile to consider the effect of the 1964 amendment.

Prior to the 1964 amendment, by virtue of KRS 342.285, the court was bound to follow the "substantial evidence rule" as to the board's findings of fact. However, after the 1964 amendment to KRS 342.285, there is an apparent contradiction in the section. KRS 342.285(3) provides that: "The court shall not substitute its judgment for that of the board as to the weight of evidence on questions of fact." This provision is essentially a restatement of the "substantial evidence rule," and would appear to authorize the court to continue its adherence to that rule. But when we look to KRS 342.285(3)(d), we find that the court's review is limited to determining, *inter alia*, whether or not "the order, decision, or award is *clearly erroneous* on the basis of the reliable, probative, and material evidence contained in the whole record." (Emphasis added.) This provision would ostensibly require the court to follow the "clearly erroneous rule."

In view of this conflict in KRS 342.285, as it stands after the 1964 amendment, it might reasonably be expected that the Court of Appeals will adopt the "clearly erroneous rule" since the scope of review allowed by that rule is much broader than that allowed by the "substantial evidence rule." Under the "clearly erroneous rule," the court may both weigh and consider the evidence not to determine if the finding of fact has a reasonable basis, but to determine if it is right. Although the Court of Appeals may well resolve the conflict presently existing in KRS 342.281 in favor of the "clearly erroneous rule," since this interpretation would give the court much more

⁶¹¹ *Mullins v. Blanton*, 385 S.W.2d 779 (Ky. 1964); *Tecon Corp. v. Oser*, 385 S.W.2d 55 (Ky. 1964); *J&R Coal Co. v. Carter*, 382 S.W.2d 875 (Ky. 1964); *Imperial Elkhorn Coal Co. v. Newsome*, 382 S.W.2d 864 (Ky. 1964); *Creekmore v. Workmen's Compensation Board*, 382 S.W.2d 196 (Ky. 1964).

⁶¹² *Savage v. Claussner Hosiery Co.*, 379 S.W.2d 473 (Ky. 1964); *Humble v. Liggett & Myers Tobacco Co.*, 239 S.W.2d 469 (Ky. 1951); *George I. Stagg Co. v. O'Nan*, 286 Ky. 527, 151 S.W.2d 54 (1941).

latitude in reviewing findings of fact of the board, the court had no opportunity to interpret the statute this past term, hence the difficulty remains unresolved.

The well established rule that the weight to be given conflicting evidence is a matter solely for the board was reiterated in five cases this term.⁶¹³ The Court of Appeals also restated the well-founded rule that the burden of proof is on the claimant to establish his claim.⁶¹⁴

In *Vicars v. Beaver Creek Mining Co.*,⁶¹⁵ the court held that where the testimony of a defense physician that claimant did not have silicosis was based upon certain X-rays of claimant, and such testimony was in direct conflict with the claimant's physicians' testimony, the board abused its discretion in overruling a motion by claimant to require the defense to produce the X-rays relied on by defendant's physician.

In *Cutshin Coal Co. v. Begley*,⁶¹⁶ the claimant stopped working for appellants on March 7, 1959, not because of disability, but because he was having difficulty breathing. He was unable to work thereafter. In June 1962, he was advised by a doctor of a condition indicating silicosis, and shortly thereafter he filed his claim for compensation. KRS 342.316(2)(3) provide that "after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted such disease," then, under KRS 342.316(2), notice of the claim shall be given "as soon as practicable," and, under KRS 342.316(3), the right to compensation shall be barred unless a claim is filed within one year after the employee experiences such symptoms. Appellants contended that when the claimant last worked he was aware of symptoms indicating an occupational disease, therefore, he was required to give notice of his disability "as soon as practicable" under KRS 342.316(2) and to file his claim within one year under KRS 342.316(3). The board awarded total and permanent disability to the claimant. The Court of Appeals held that on the evidence the board could properly find that the employee was not sufficiently aware that he had contracted an occupational disease until shortly before he gave notice and filed his claim. This ques-

⁶¹³ *Branham v. Eastern Coal Corp.*, 389 S.W.2d 926 (Ky. 1965); *Mullins v. Blanton*, 385 S.W.2d 779 (Ky. 1964); *Horton v. United States Steel Corp.*, 384 S.W.2d 73 (Ky. 1964); *J&R Coal Co. v. Carter*, 382 S.W.2d 875 (Ky. 1964); *Imperial Elkhorn Coal Co. v. Newsome*, 382 S.W.2d 864 (Ky. 1964).

⁶¹⁴ *Branham v. Eastern Coal Corp.*, *supra* note 613; *Akers v. United Carbon Gas Co.*, 386 S.W.2d 957 (Ky. 1965).

⁶¹⁵ 387 S.W.2d 590 (Ky. 1965).

⁶¹⁶ 385 S.W.2d 59 (Ky. 1964).

tion is one of fact to be determined by the board, and if based upon sufficient evidence, the board's finding will not be disturbed.

Thus, although the court pointed out that the claimant was in fact disabled as of the time he left appellant's employment since he had not been able to work thereafter, it held that the three year interim between the termination of employment and the filing of the workmen's compensation claim did not preclude the Board from finding that claimant had complied with the notice and filing requirements of KRS 342.316(2)(3). This result would appear correct when we consider, as advanced by the court, that silicosis is difficult even for an expert to diagnose, that the difficulties experienced by claimant could have had many causes other than an occupational disease; and that claimant's knowledge of his disability did not necessarily establish that he was aware that he had an occupational disease.

Another interesting case decided this term which involved KRS 342.316(3) was *Good v. Russell Fork Coal Co.*⁶¹⁷ Claimant was laid off due to a reduction in the work force in December 1958. He was called back to work in April 1959, and directed to take a physical examination. The doctor recommended that claimant should not be employed in the mines where he would be exposed to dust, and as a result of this recommendation, appellant was dismissed from work. Claimant did not file his claim for compensation until October 30, 1961. Claimant testified that at the time his job was terminated he told the superintendent that he had been advised by the doctor that he had silicosis, and that he was expecting workmen's compensation benefits. The employer defended under KRS 342.316(3), which provides that the right to compensation for an occupational disease shall be barred unless a claim is filed with the board "within one year after the last injurious exposure to the occupational hazard or after the employe first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, whichever shall last occur." Claimant contended that a finding that he knew he had silicosis at the time his last employment was terminated would not bar recovery, because there was no evidence that he was disabled at that time, and the statute does not commence to run until disability occurs. The board dismissed the claim on the ground that it was barred by KRS 342.316(3). The Court of Appeals held that the evidence was sufficient to support the board's dismissal of the claim under KRS 342.316(3). The opinion explained that from claimant's

⁶¹⁷ 387 S.W.2d 842 (Ky. 1965).

own testimony it was apparent that he knew he had a compensable disease at the time his job was terminated. Although the court conceded that the statute does not begin to run until the employee is disabled, it found that, in fact, claimant was disabled at the time he was last discharged. This conclusion was based upon the fact that, although claimant desired to work, he was dismissed solely because he was afflicted with silicosis. Thus, the court restated the rule that "disability," for workmen's compensation purposes, means inability to do work which claimant regularly performs, and he need not be disabled from any and every kind of work.⁶¹⁸

When we view the *Cutshin* and *Good* cases together, the result is interesting. In *Cutshin*, the court held that, although the claimant had been disabled for more than three years, the board could properly find that the claimant was not sufficiently aware that he had contracted an occupational disease until shortly before he filed for workmen's compensation, therefore, he was not barred by KRS 342.316(3). In the *Good* case, even though the court found that claimant knew at the time he was discharged that he was suffering from an occupational disease, the opinion stated that the statute⁶¹⁹ would not begin to run until claimant was disabled. Thus, when we analyze these two cases together, we find that in order for a claimant to be barred under KRS 342.316(3) he must be *both* disabled and aware that he has an occupational disease for more than a year before the claim is filed.

KRS 342.316(4) provides that: "In claims for compensation due to the occupational disease of silicosis . . . it must be shown that the employee was exposed to the hazards of the disease in his employment within this state for at least two years immediately next before his disability or death." Pursuant to this statute, and *Chapman v. Eastern Coal Corp.*,⁶²⁰ the court held that an employee has no claim to compensation for silicosis unless the employee was exposed to the hazards of the disease during the two years of Kentucky employment *immediately* preceding the disability. Chapman had worked for appellee inside coal mines from 1936 to 1944. In 1944 he began working outside the mines, and he continued to work outside until 1961, when he left the employment of appellee because of a heart attack. The board found that Chapman had not been exposed to

⁶¹⁸ *Leep v. Kentucky State Police*, 366 S.W.2d 729 (Ky. 1962); *E&L Transp. Co. v. Hayes*, 341 S.W.2d 240 (Ky. 1960).

⁶¹⁹ KRS 342.316(3).

⁶²⁰ 385 S.W.2d 78 (Ky. 1964).

silicon particles to a sufficient degree to cause silicosis since 1944 and denied compensation. The Court of Appeals affirmed.

In *Derby Coal Co. v. Caldwell*,⁶²¹ claimant suffered a ruptured intervertebral disc while working at hard labor in the appellant's mine. It appeared from the medical testimony that a portion of claimant's disability might be attributable to a nondisabling degenerative disc condition which existed prior to the accident. Accordingly, the subsequent claim fund was made a party defendant, in accordance with the provisions of KRS 342.120, and, pursuant to KRS 342.121, the board appointed a physician to examine claimant and to determine, *inter alia*, the extent to which claimant was permanently disabled. The physician estimated that claimant was fifty per cent permanently disabled. The physician concluded the report by stating that claimant could do only light work. Based on the physician's report, the board awarded compensation on the basis of fifty per cent disability. The circuit court reversed as to the extent of the permanent disability, and awarded one hundred per cent permanent total disability. The Court of Appeals held that the claimant, whose occupation consisted of hard labor in coal mines, was permanently and totally disabled for workmen's compensation purposes when, after the injury in question, he was unable, without further surgery, to do even moderately hard work. "Totally disabled" does not mean that claimant must be completely unable to do any work; it means that he must be incapacitated to perform the type of work demanded by his occupation.⁶²² Here, the physician's report, upon which the Board's award was based, employed the term "disability" in terms of general physical impairment rather than the claimant's capacity to perform the type of work demanded by his occupation.

Another case decided this term which restated the rule that "total disability," under workmen's compensation law, does not require that the workman be unable to do any and every kind of work was *Eastern Coal Corp. v. Maynard*.⁶²³ The employer admitted that while claimant was in its employ he was exposed to conditions which cause silicosis and that functional impairment of at least fifteen or twenty per cent was proved. Of the five doctors who examined claimant, four found that claimant also had a heart condition, while only one did not find the heart condition and was of the opinion that

⁶²¹ 383 S.W.2d 905 (Ky. 1964).

⁶²² *Leep v. Kentucky State Police*, 366 S.W.2d 729 (Ky. 1962); *E&L Transp. Co. v. Hayes*, 341 S.W.2d 240 (Ky. 1960); *Clark v. Gilley*, 311 S.W.2d 391 (Ky. 1958).

⁶²³ 384 S.W.2d 320 (Ky. 1964).

claimant was totally and permanently disabled, because of silicosis, from engaging in further work in the mines or in other heavy manual labor. The board found claimant to be permanently and totally disabled. The Court of Appeals held that a substantial functional disability resulting from silicosis, even though not total, may incapacitate the employee to work in the occupation for which he is qualified, and, if coupled with substantial incapacity to perform other kinds of work, may constitute total disability. Further, the board could accept the opinion of the one doctor to the effect that claimant was totally and permanently disabled solely because of his silicotic condition, even though the four other doctors attributed part of the employer's impairment to a heart condition.

The Court of Appeals decided two significant cases this term that dealt with mental disturbances which allegedly were precipitated by compensable injuries. In *Holland v. Childers Coal Co.*,⁶²⁴ claimant sustained a relatively minor physical injury when struck by slate while working in appellee's mine. Although the three physicians who examined claimant could find no serious physical injury from the accident, and concluded that claimant's physical impairment from the accident was minor, claimant said he was unable to work, he was insensitive to pin pricks on the right side of his body, had difficulty in swallowing, and, eventually, became unable to feed or dress himself, and became practically a bed patient. However, none of the physicians accused claimant of malingering, and they concluded that his condition was psychosomatic, that his emotional state precluded present employment as a miner, and that he was in need of psychiatric treatment. Accordingly, claimant was committed to Eastern State Hospital. Claimant's psychiatrist at the hospital diagnosed claimant's condition, as psychotic depressive reaction, and commenced treatment. The psychiatrist testified that claimant's mental condition showed marked improvement, that the time of his discharge was approaching, and that he should be able to work after discharge, but would be subject to possible recurrence of his depressive state. The psychiatrist concluded that claimant suffered some degree of physical disability, which disability precipitated the psychosomatic mental condition, but the psychiatrist would not deny that anxiety over his compensation claim probably aggravated claimant's condition. The Board found that the injury sustained by claimant arose out of and in the course of his employment and awarded him compensation for twenty per cent permanent partial disability, but they re-

⁶²⁴ 384 S.W.2d 293 (Ky. 1964).

fused to attribute the ensuing emotional complications to the accident. The Court of Appeals held that when a psychosomatic illness is caused by a compensable physical disability, the disability resulting from the psychosomatic illness is compensable. The opinion pointed out that previous decisions had held that disability from traumatic neurosis is fully compensable if the originating or precipitating trauma arises out of and in the course of the employment.⁶²⁵ The court stated that from the standpoint of causation it could perceive no logical distinction between traumatic neurosis and a psychotic depressive reaction resulting from an injury. The court held that, subject to the maximum statutory limits,⁶²⁶ claimant should be awarded compensation for temporary total disability until released from the hospital. The court stated that the line of causation from the original injury to the existing disability is not broken by the fact that anxiety over compensation aggravated the disability—that is, if the mental illness is genuine, the claimant will not be denied compensation on the ground that “compensation neurosis” aggravated the disability.

The second case decided this term which dealt with a mental disturbance was *Messer v. Drees*.⁶²⁷ The Court of Appeals held that where the claimant had been awarded compensation for temporary total and permanent partial disabilities which resulted from an accidental injury, and subsequently, for the purpose of inducing the Board to reopen the case, competent psychiatric evidence was introduced to the effect that claimant was permanently and totally disabled from the accident because of a resulting traumatic neurosis, there was sufficient evidence of a change of circumstances to warrant a reopening of the case,⁶²⁸ and the Board erred in refusing to reopen.

In *Norrington v. Charles E. Cannell Co.*,⁶²⁹ the Court of Appeals held that a woman who had lived with deceased employee for seventeen years, but without a marriage ceremony and without having obtained a divorce from her legal husband, was not a “dependent” of such deceased employee within the workmen’s compensation statutes, therefore, not entitled to workmen’s compensation benefits upon his death.

The Court of Appeals, in *Whittenberg Eng’r & Constr. Co. v. Lib-*

⁶²⁵ *Stone v. Arthur Hewitt Designs, Inc.*, 358 S.W.2d 513 (Ky. 1962); *Eastern Coal Corp. v. Thacker*, 290 S.W.2d 468 (Ky. 1956).

⁶²⁶ KRS 342.095.

⁶²⁷ 382 S.W.2d 209 (Ky. 1964).

⁶²⁸ KRS 342.125(1).

⁶²⁹ 383 S.W.2d 137 (Ky. 1964).

⁶³⁰ 390 S.W.2d 877 (Ky. 1965).

erty Mut. Ins. Co.,⁶³⁰ restated the existing rule⁶³¹ that the workmen's compensation insurer of a subcontractor can recover from the general contractor, in the form of a common law right of indemnity, reimbursement of workmen's compensation payments paid to the employees of the insured subcontractor for injuries resulting from the negligence of the general contractor.

⁶³¹ *Johnson v. Ruby Lumber Co.*, 278 S.W.2d 71 (Ky. 1954); *Ruby Lumber Co. v. K. V. Johnson Co.*, 299 Ky. 811, 187 S.W.2d 449 (1945).